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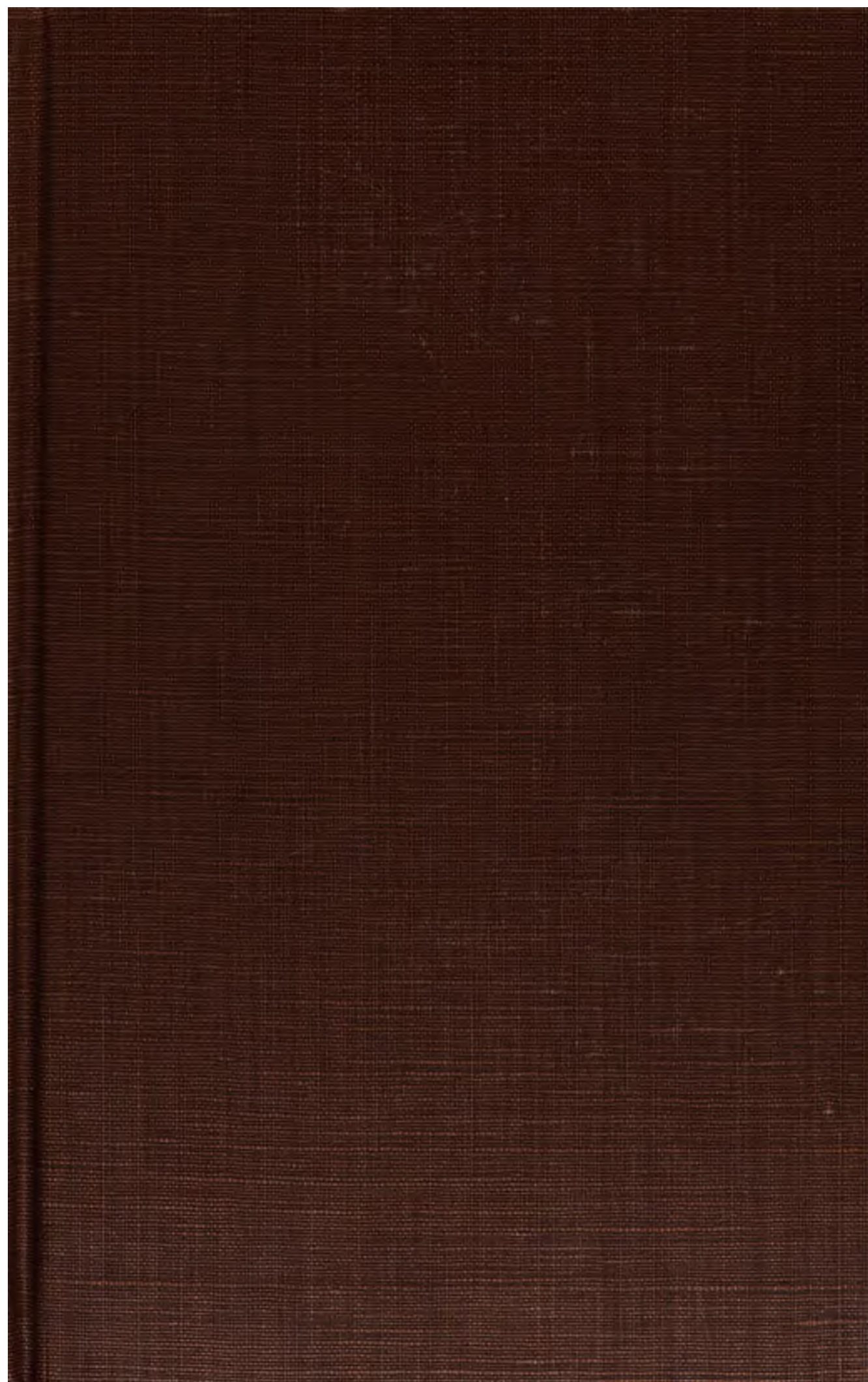
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IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,
EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1864, 1865 AND 1866.

Queen's Bench;
BY J. LOWRY WHITTLE, ESQ., AND D. H. MADDEN, ESQ.

Common Pleas;
BY VALENTINE J. COPPINGER, ESQ.

Exchequer;
BY CHARLES H. FOOT, ESQ. AND R. R. KANE, ESQ.
Exchequer Chamber;
BY JAMES LOWRY WHITTLE, V. J. COPPINGER, ESQ.
AND CHARLES H. FOOT, ESQ.

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 OF CASES ARGUED AND DETERMINED IN
 THE COURTS OF
 QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,
Exchequer Chamber,
 AND
 COURT OF CRIMINAL APPEAL.

ANNE HUMPHRIES *v.* DANIEL CONNOR,
 Sub-inspector of Constabulary.*

(*Queen's Bench.*)

H. V. 1864.
Queen's Bench
 Feb. 23, 24.

DEMURRER.—The summons and plaint contained but one paragraph, wherein the plaintiff complained that the defendant assaulted and beat her, and tore and spoiled her clothes.

The second defence was in these terms:—That before and at the time of the committing of said alleged assault, the defendant was, and from thence continually has been, a Sub-inspector of Constabulary in and for the county of Cavan; and before and at the time of the committing of the said alleged assault, the plaintiff was walking through the street of the town of Swanlinbar in said county, in open day, at or about the hour of twelve o'clock, noon, wearing a party emblem—namely, an orange lily, the wearing whereof at said time was calculated and tended to provoke animosity between

Action for assault. The defendant pleaded that he was a Sub-inspector of Constabulary; that plaintiff went through the street wearing a party emblem, the wearing whereof was calculated and tended to provoke animosity; that a crowd followed, threatening her, and on the refusal of the plaintiff to remove the said

emblem, the defendant, "as such Sub-inspector, in order to preserve the public peace, which was likely to be broken in consequence of the said conduct of the plaintiff, and to protect the plaintiff from the said threatened violence, and which violence the said several persons who were provoked by the conduct of the plaintiff, in consequence of the said conduct, were likely to inflict on the plaintiff, and in order to restore order and tranquillity in said town, then gently and quietly, and necessarily and unavoidably removed said emblem from the plaintiff," &c. Demurrer thereto.

Held (dubitante FITZGERALD, J.), overruling demurrer, that the defence was good.

* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

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different classes of her Majesty's subjects; and several of her Majesty's subjects, who were provoked by the plaintiff's then wearing said emblem as aforesaid, followed after the plaintiff, and in consequence thereof caused very great noise and disturbance in said street, and threatened the plaintiff with personal violence for wearing said emblem; and therefore the defendant, as such Sub-inspector as aforesaid, and in order to prevent a breach of, and to preserve the public peace, and for the purpose of protecting the plaintiff from said threatened personal violence, and in order to restore order and tranquillity in said town, requested the plaintiff to remove said emblem. But the plaintiff refused so to do, and continued to wear said emblem, and thereby to excite and provoke said several persons to inflict personal violence on the plaintiff, and to cause them to make said noise and disturbance, and threaten her with personal violence, as aforesaid. Whereupon the defendant, as such Sub-inspector as aforesaid, in order to preserve the public peace, which was likely to be broken by and in consequence of the said conduct of the plaintiff, and to protect the plaintiff from the said threatened violence, and which violence the said several persons who were provoked by the conduct of the plaintiff, as aforesaid, in consequence of her said conduct, were likely to inflict on the plaintiff, and in order to restore order and tranquillity in said town, then gently and quietly, and *necessarily and unavoidably*, removed said emblem from the plaintiff, doing her no injury whatever; and in so doing, and for the purpose of so doing, *necessarily* committed the said alleged trespass in the introductory part of this plea mentioned, and thereby protected the plaintiff from said threatened personal violence, which would otherwise have been inflicted on her, and preserved the public peace, which was likely to be, and would otherwise have been broken.

To this defence the plaintiff demurred on the grounds:—That the act of the plaintiff mentioned in the second defence was a perfectly legal act, and afforded no excuse for any turbulence on the part of others; and that, under the circumstances mentioned in the defence, it was the duty of the defendant to protect the plaintiff, and not to assault or restrain her in the exercise of a legal right.

J. P. Hamilton (with whom was *Dowse*), in support of the demurrer. H. V. 1864.
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A constable has no right to assault a person, who is not doing an illegal act, even though his purpose is to preserve the peace and prevent that person from being assaulted: *Timothy v. Simpson* (a); *Coward v. Baddeley* (b); *Rawlings v. Till* (c); *Forde v. Skinner* (d). The purpose with which the act was done is not applicable to a plea of justification, though it does apply to a traverse: *James v. Campbell* (e); and the question is, whether the assault, admitted by the demurrer, is justified by the plea?—[O'BRIEN, J. The plea avers that the act was done in order to protect the plaintiff.]—A constable has not any power to protect a person against his will. If a mob was angry with a man because he used machinery, a constable would not be entitled to prevent him using the machinery in order to avert the threatened violence. Coupsel also cited *Peddell v. Rutter* (f) and *Cook v. Nethercote* (g).

MacMahon, and *Hemphill*, contra.

In *Coward v. Baddeley* the act was done against the will of the plaintiff, and yet there was not any assault in that case, because the intention to assault was wanting. It is the *quo animo* that constitutes the assault: *Alderson v. Waistell* (h). The constable did not exceed the duties of his office: *Regina v. Brown* (i); *The King v. Stubbs* (k); 1 *Black. Com. by Christian*, p. 356; *Regina v. Hogan* (l).—[FITZGERALD, J. In that case the party was engaged in unlawfully obstructing the thoroughfare.]—*Cohen v. Huskisson* (m).—[FITZGERALD, J. If your defence had alleged that the act was done *with the intent* to commit a breach of the peace, the question would be different; but that is not alleged. In the case of *Regina v. Hogan* the object of the person was to collect a crowd.]—

(a) 1 Cr. Mee. & Rus. 757.

(c) 3 Mee. & W. 28.

(e) 5 C. & P. 372.

(g) 6 C. & P. 741.

(i) C. & M. 314.

(l) 8 C. & P. 167.

(b) 4 H. & N. 480.

(d) 4 C. & P. 239.

(f) 8 C. & P. 337.

(h) 1 C. & K. 358.

(k) 2 T. R. 406.

(m) 2 Mee. & W. 477.

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 CONNOR. But if a person went through a town collecting a crowd, as, if a white quaker walked through the streets.—[FITZGERALD, J. Put that case of a white quaker. Would a policeman be entitled to stop him, and undress him in the street?—The policeman would be entitled to do anything necessary to preserve him from violence. A man is not answerable for a hurt which ensues in his attempt to save another: *Buller's N. P.*, p. 16; *Burton v. Hewson (a)*; *Com. Dig.*, tit. Battery, a, p. 272; 1 *Sel. N. P.* (12th ed.), p. 27; *Williams v. Jones (b)*; *Wiffin v. Kincard (c)*; *Price v. Seeley (d)*; *The Queen v. Light (e)*; *Dericourt v. Corbishley (f)*.

Hamilton was heard in reply.

Cur. adv. vult.

O'BRIEN, J.

Feb. 24.

My Brother HAYES and I are of opinion that the defence demurred to is good in law. The truth of the facts set forth in that defence will be matter for investigation at the trial; but in arguing this demurrer, it is of course to be assumed that they are correctly stated. I have also to observe that our decision in defendant's favour does not proceed upon the supposition that the act of plaintiff's wearing an orange lily, in the presence of other persons, was in itself illegal; but we think that although her doing so, under other circumstances, could not properly be prevented or interfered with, yet that under the circumstances mentioned in the defence, the defendant was justified in removing the lily from the plaintiff in the manner therein stated, which (according to the defence) constitutes the entire assault complained of.

The defence states, that the defendant was Constabulary Inspector in the district in which the transaction occurred; and I need not say that it was his duty, as such, to preserve the public peace and prevent a breach of it. The defence also states in substance, that plaintiff's wearing the orange lily at that time was calculated

(a) 10 M. & W. 108.

(b) *Cas. temp. Hardwicke*, 284.

(c) 2 Bos. & Pul. N. Rep. 474.

(d) 10 Cl. & Fin. 28.

(e) 27 Law Jour., N. S., Mag. Cas. 1.

(f) 5 El. & Bl. 188.

and tended to provoke animosity among different classes of her Majesty's subjects; that several persons, who were provoked by it, followed the plaintiff, made a great disturbance, and threatened plaintiff with personal violence; that the defendant, in order to preserve the public peace and prevent a breach of it, and in order to prevent plaintiff from such threatened violence, and to restore order, &c., requested plaintiff to remove the lily; that plaintiff refused to do so, and on the contrary continued to wear it, and thereby to excite and provoke those persons to inflict personal violence on her, and to cause such disturbance and threats. It further states, that it was likely the public peace would be broken, and violence inflicted on the plaintiff, in consequence of her continuing to wear the lily; and that in order to preserve the public peace, and protect plaintiff from such threatened violence, the defendant *gently and quietly*, and *necessarily and unavoidably*, removed the lily from plaintiff, doing her no injury whatever, and thereby protected plaintiff from such threatened violence, which would otherwise have been inflicted upon her, and preserved the public peace, which would otherwise have been broken. Such is the substance of the defence. It may be that it does not truly represent the actual circumstances of the case; that it exaggerates the probability of disturbance and violence, or that (as the facts really were) those results could and should have been more properly prevented by defendant's interfering with such other persons, than by his taking the lily from plaintiff; and that accordingly his adopting the latter course was not necessary for the purpose he had in view. If this be so, plaintiff will succeed at the trial of this case on the issue found as to the truth of the defence, and will ultimately recover in this action. But assuming (as on the present demurrer we are bound to do) that the defence truly states and represents the facts, it appears from it that the act complained of—namely, the removal of the lily from plaintiff, gently and without doing her any injury whatever, was necessary for the purposes of restoring order and preserving the public peace, and protecting plaintiff from personal violence; that it had such an effect; and

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H. V. 1864. that but for it the public peace would have been broken, and
Queen's Bench personal violence inflicted on plaintiff.

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Defendant's Counsel accordingly contend that the defence is a good justification of the act done by defendant as therein stated, because it shows, first, that such act was necessary for the purpose of preventing disturbance, and a breach of the public peace, and restoring order, &c.; and, secondly, that it was necessary, and was done for the purpose of protecting plaintiff from personal violence being inflicted upon her. With respect to the first ground, I have already observed that it was defendant's duty as a constable to preserve the public peace, and to prevent the breach of it by disturbance or otherwise; and it appears to me that some of the authorities cited in the argument show that, under the circumstances stated in the defence, he was justified in acting as therein mentioned. The observations of Baron Alderson in *Cooke v. Nethercote* (a), and in *Regina v. Browne* (b), and those of Baron Parke, in *Kyle v. Bell* (c), show the power which policemen have, even to arrest a party, in order to prevent a breach of the peace being committed or renewed. In another case—*Regina v. Hogan* (d)—where it appeared that a man playing the bagpipes at night had attracted a crowd of dissolute persons about him, Coltman, J., held that a constable who had directed the man to move on did not exceed his duty by merely laying his hand on the man's shoulder, with that view only.

According to the statements in the defence now before us, the act complained of—namely, the removal of the lily *quietly, gently, and without* any injury whatever to the plaintiff—though an assault in point of law, was not a greater one than those complained of in some of the cases referred to; and it was done by defendant for the purpose of preventing a breach of the public peace, &c., and was necessary for that purpose. It has, however, been urged by plaintiff's Counsel that injurious consequences would result from our decision in defendant's favour—giving to constables a power so capable of being abused. I think it sufficient, in answer to this

(a) 6 C. & P. 744.

(b) 1 C. & M. 314.

(c) 1 M. & W. 519.

(d) 8 C. & P. 171.

argument, to say that our decision would not be applicable to a state of facts where the power was abused; and that it would not protect a constable from any unnecessary, excessive, or improper exercise of such power in other cases.

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As my Brother HAYES and I are of opinion that the defence is a good justification upon the first ground relied on, it is not necessary for us to decide the validity of the second ground, namely, that the act complained of was necessary, and was done for the purpose of preventing plaintiff from personal violence being inflicted upon her, I shall merely say that, where such an act as that stated in the defence was necessary for that purpose, was done for that object, and had that effect, without any injury whatever to the plaintiff, it would, in my opinion, be difficult to contend that defendant would be liable to an action, on the ground that, although such act was for the benefit of plaintiff, it was done against her will.

HAYES, J.

I have little more to do than to express my entire concurrence with what has fallen from my Brother O'BRIEN. A constable, by his very appointment, is by law charged with the solemn duty of seeing that the peace is preserved. The law has not ventured to lay down what precise measures shall be adopted by him in every state of facts which calls for his interference. But it has done far better; it has announced to him, and to the public over whom he is placed, that he is not only at liberty, but is bound, to see that the peace be preserved, and that he is to do everything that is necessary for that purpose, neither more nor less. What he does, he does upon the peril of answering to a jury of his country; when his conduct shall be brought into question, and he shall be charged either with exceeding or falling short of his duty. In the present case it is said that it would be a lamentable thing if an individual were to be obstructed and assaulted when doing a perfectly legal act; and that there is no law against wearing an emblem or decoration of one kind or another. I agree with that in the abstract; but I think it is not straining much the legal maxim, *sic utere tuo ut*

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alienum non lēdas—to hold that people shall not be permitted to use even legal rights for illegal purposes. When a constable is called upon to preserve the peace, I know no better mode of doing so than that of removing what he sees to be the provocation to the breach of the peace; and, when a person deliberately refuses to acquiesce in such removal, after warning so to do, I think the constable is authorised to do everything necessary and proper to enforce it. It would seem absurd to hold that a constable may arrest a person whom he finds committing a breach of the peace, but that he must not interfere with the individual who has wantonly provoked him to do so. But whether the act which he did was or was not, under all the circumstances, *necessary* to preserve the peace, is for the jury to decide. The defendant in his defence asserts that it was; and, for the purposes of this demurrer, we must take that assertion to be true. In my opinion the plea is good.

FITZGERALD, J.

My Brother O'BRIEN has already intimated that I entertain a doubt—and I may add a very serious doubt—as to the correctness of the judgment of the Court, though I defer to the greater experience and sounder opinions of my Brothers. It was admitted that the plaintiff, who complains of her personal rights having been interfered with, was doing no illegal act in wearing this emblem; and it is not averred that she *intended* to provoke a breach of the peace. The constable asked the lady to remove the emblem; she refused so to do; and he then, as he alleges, in order to preserve the peace, and to protect her, removed the emblem against her will. No doubt that is in point of law an assault.. He placed his hands upon her, and by force removed the emblem; and if he may do that, he might as well have removed a bonnet trimmed with orange ribbons, or a handkerchief from around her neck. But the question is, does the law warrant such an interference with the rights and liberty of a person doing no illegal act? With respect to a constable, I agree that his primary duty is to preserve the peace; and he may for that purpose interfere, and, in the case of an affray, arrest the wrong-doers; or, if a breach of the peace is imminent, may, if necessary,

arrest those who are about to commit it, if it cannot otherwise be prevented. But the doubt which I have is, whether a constable is entitled to interfere with one who is not about to commit a breach of the peace, or to do, or join in any illegal act, but who is likely to be made an object of insult or injury by other persons who are about to break the Queen's peace. I would not have ventured to express my doubt except that very important consequences may result from the principle of the decision of my Brothers in this case.

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I do not see where we are to draw the line. If a constable is at liberty to take a lily from one person, because the wearing of it is displeasing to others, who may make it an excuse for a breach of the peace, where are we to stop? It seems to me that we are making, not the law of the land, but the law of the mob supreme, and recognising in constables a power of interference with the rights of the Queen's subjects, which, if carried into effect to the full extent of the principle, might be accompanied by constitutional danger. If it had been alleged that the lady wore the emblem with an intent to provoke a breach of the peace, it would render her a wrongdoer; and she might be chargeable as a person creating a breach of the peace.

I have thought it necessary to express the doubts which I entertain; but I defer to the greater experience of my Brethren,

WILLIAM MURPHY and others

v.

WILLIAM THOMAS BRISTOW LYONS and
ALEXANDER CROSSETT.

May 3, 4.
June 23.

DEMURRER.—The action was in replevin; and the writ of summons and plaint contained one paragraph, which stated that the defendants, on the 20th day of May 1862, in a certain mill or factory of the borough of B. for the time being; and the Act is to be put in force within those limits subject to the subsequent provisions of the Act. Section 276 enacts that "It shall be lawful for the Council from time to time to direct and declare what districts within the limits of this Act shall be lighted and watched under the authority of this

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plaintiffs, situate at or contiguous to Linfield road, near to the town of Belfast, in the county of Antrim, took and unjustly detained the goods and chattels of the plaintiffs, that is to say, 680 bundles or webs of linen cloth, to the plaintiffs' damage of £50.

Defence :—That, on the 1st of January 1854, the Council of the borough of Belfast, in pursuance of, and for the purposes mentioned in, the 8 & 9 *Vic.*, (Loc. & Per.), c. 142, modified and extended by other statutes, duly made a rate for the period from the 1st of January 1854 to the 31st of December 1854, upon the occupiers of all houses, buildings, tenements, quays, wharfs, and other hereditaments, within the limits of the said borough, according to the annual value of the same—that is to say, &c.; and, when the said annual value did exceed £20, a rate of two shillings in the pound; and the said rate was afterwards duly signed by the Mayor and Town-clerk.

Averments :—That, at the time of the making of the said rate, and from thence hitherto, the plaintiffs were the occupiers of certain tenements and hereditaments, to wit, a spinning mill and manufactory, situate at Linfield road, within the limits of the said borough, and in the county of Antrim, consisting, of, &c., and all other the appurtenances hereinafter styled tenements and hereditament, No. 1, exceeding the annual value of £20, to wit, the annual value of £500, and in respect of which the plaintiffs were subject and liable to the payment of said rate; and that as such occupiers the plaintiffs

Act; and in like manner from time to time to declare and direct whether any and what districts shall be added to the parts already lighted and watched; and the districts so appointed to be lighted and watched as aforesaid, and the districts from time to time added thereto, shall be considered as the districts to be lighted and watched by the Council under the authority of this Act, until the same shall be altered by the Council; and the owners and occupiers of any messuages, houses, shops, buildings or premises, not within the district so from time to time set out and lighted and watched, shall not be subject or liable to payment of any of the rates by this Act directed to be raised." The Act contained sections giving appeal to P. S. A was the owner of certain premises within the limits of the borough, in a district "directed to be lighted and watched," but not actually lighted and watched. Having been assessed for certain rates, A did not appeal, and now sought to raise the question of his liability by action of replevin.

Held (FITZGERALD, J., *dissentiente*) that A's position ousted [the jurisdiction of the Town Council; and so that the question could be raised by action.

By a subsequent special Act (16 & 17 *Vic.*, c. 114) it was provided that the owner of a demesne of forty acres, under certain circumstances, should be exempt.

Held, that this section does not oust the jurisdiction of the Town Council, but, being only matter of exemption, should be raised by appeal, and not by action of replevin.

were by the said rate duly rated in the sum of £50, being two shillings in the pound upon the aforesaid annual value of the said tenements and hereditaments.—[Like averments, with respect to certain other premises, situate at the same place, and styled “Tenements and hereditaments No. 2,” and rated for the year 1854 to the amount of £58.]—And the defendants aver that, after the making of the said rate, the said Council caused public notice thereof to be given, by posting, &c.; and did further direct, as provided by the said statutable enactments in that behalf, that the same should be, and the same was thereby, made payable on the 20th of January 1854. And the defendants further aver that the said rate was open to the inspection of all persons rated therein, at all seasonable times; and the defendants further aver *that the plaintiffs did not appeal against said rate.*

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[Then followed like averments, with respect to rates struck on the 1st of January in each of the years 1855, 1856, 1857, 1858, and 1859.]

The defendants further averred that, after the rates were respectively due and payable, payment of them respectively was by the Council's collectors demanded in writing from the plaintiffs, who made default; that, after the expiration of fourteen days from the making of the demand, six several summonses were, on the application of the Council, issued by the defendant Lyons, a Justice of the county, having full jurisdiction in that behalf, requiring the plaintiffs to appear before two Justices, and show cause why the respective rates, with interest thereon, should not be paid; that the summonses were served on the plaintiffs, who appeared before the defendant Lyons and another Justice, and failed to show sufficient cause; that the Justices made orders for the payment of the respective amounts and costs; that no part of the respective amounts was paid; *that the plaintiffs did not appeal against the said respective orders within four months* after the making of them, which period had elapsed, and the costs had been remitted before the issuing of the warrants hereinafter mentioned; that, on the 10th of May 1862, the defendant Lyons issued six several warrants, addressed to the defendant Crossett, one of the Council's

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collectors, requiring him to levy the amount of the six rates by distress; that all things required by law were done and happened to authorise the defendant Lyons to issue the warrants, and to make them valid and enforceable against the plaintiffs' goods for the said sums; that the warrants were delivered to Crossett for execution; and that he, according to the exigency of the warrant, seized and took the goods and chattels mentioned in the summons and plaint, as a distress for the non-payment of the rates, and detained the same, as he, for the reasons aforesaid, lawfully might; which are the respective grievances, &c.

First replication:—That the tenements and hereditaments in said defence mentioned were not, nor were any of them, at the time of the making of the respective rates, or of any of them, by the Council, situate within a district in said borough set out, *and lighted and watched*, as required by the statutory enactments in that behalf and in the defence mentioned.

Second replication:—That the said several tenements and hereditaments were, at the respective times of making the several rates, and still are, certain buildings situate in a certain demesne, of an extent of not less than forty acres, and occupied therewith; and which demesne and buildings were and are situate within the borough of Belfast, and were, at the respective times, &c., and are, in the occupation of plaintiffs; being during all said time the owners thereof; and in which demesne, at the respective times, &c., streets were not laid out or formed, and on which dwelling-houses had not been built; and plaintiffs had not, before the making of the rates, by notice in writing or at all, required to be rated in respect of such demesne and buildings, or any of them, under the statutes mentioned in the defence, or any of them.

Second rejoinder to the *first* replication:—That the plaintiffs should not be admitted to plead the first replication, because, before the making of any of the rates, the Council had, pursuant to the statutes, by a certain order or direction, dated the 1st of December 1853, ordered, declared, and directed that the district therein described, situate within the limits of the borough, should be, and the same was thereby added to the parts of the borough

already lighted and watched; and that the district so described, together with the parts already appointed to be lighted and watched, should, until altered by the Council, be considered as the district to be lighted and watched; which order was, at the time of making the rates, and still is in force; that the said tenements and hereditaments were and are situate within said district, and that the plaintiffs were and still are the occupiers thereof; that the rates were made on the plaintiffs as occupiers of the said tenements and hereditaments so situate within that district; that the time allowed by the statutes for appealing against any of the rates elapsed long before the institution of any of the proceedings mentioned in the defence for recovery of the rates; that the plaintiffs did not appeal from any of the rates, which the defendants are ready to verify; and the defendants prayed judgment, if the plaintiffs ought to be admitted or received, contrary to their acts and non-appeal as aforesaid, and their acquiescence, and against the said order, declaration, and direction, to plead the first replication.

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Third rejoinder to the *first* replication:—That the plaintiffs should not be admitted to plead the *first* replication, or so much thereof as alleges that the said tenements and hereditaments were not, nor were any of them, within a district within the said borough, *lighted and watched*, because the several facts stated in the last rejoinder occurred and happened as therein stated—[prayer that it may be incorporated with this rejoinder];—that, after the time for appealing against the rates had expired, the proceedings and adjudication mentioned in the defence were had and pronounced; that the plaintiffs not having appealed within four months, or at all against that adjudication, the proceedings relating to the warrant and distress were had, as mentioned in the defence, which the defendants are ready to verify; and they prayed judgment if the plaintiffs ought, contrary to their acts and non-appeal, as aforesaid, and their acquiescence, and against the said order and direction, to be admitted or received to plead the first replication, as in the introductory part of this rejoinder mentioned. And the defendants submitted that the plaintiffs were *estopped* and precluded from maintaining this action of replevin against the defendants.

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The second and third rejoinders to the second replication were respectively precisely the same as the second and third rejoinders to the first replication.

To these four rejoinders the plaintiffs demurred.*

Dix and Chatterton, for the plaintiffs.

The rejoinders, as pleaded, can only be relied on as estoppels :
Co. Litt. 352, *a* ; *The Duchess of Kingston's case* (*a*). The present

(*a*) 2 Sm. Lead. Cas. (5th ed.) 664.

* The following points of demurrer to the second and third rejoinders to the first replication, were noted for argument :—

First—That the tenements and hereditaments in the defence and subsequent pleadings mentioned, and as occupiers of which the plaintiffs were rated by the Council of the borough of Belfast, being situate in a district within said borough, which was not, at the times of making said respective rates, set out and lighted and watched, as required by the statutory enactments in that behalf, the making and imposing of said rates by the said Council on the plaintiffs was wrongful, illegal and void, and made on the plaintiffs for premises not within the jurisdiction of such Council in that behalf.

Second—And further, as to the said third rejoinder, that the said Justices had not any authority or jurisdiction to make orders for payment of said rates, and that said orders were wholly void, and the defendant Lyons had not any jurisdiction to issue the warrants under which the plaintiffs' goods were seized ; and that said seizure was wrongful, illegal, and without authority in law.

Points of demurrer to the second and third rejoinders to the plaintiffs' second replication :—

First—That the plaintiffs, not being liable to be rated in respect of the said tenements and hereditaments on the grounds in said second replication stated, the making notwithstanding of rates on them as occupiers of such tenements and hereditaments, was wrongful, illegal, and void, and same were made without authority in that behalf, and in a place where the said Council had not, at said times of making same, any jurisdiction to make said rates.

Second—And further, to said third rejoinder, that said Justices had not any authority or jurisdiction to make orders for payment of said rates, and that same were wholly void ; and said defendant Lyons had not any jurisdiction to issue the warrants under which the plaintiffs' goods were seized ; and that said seizure was illegal, wrongful, and without authority in law.

Points of demurrer to all the rejoinders :—

That they, or any of them, do not show any sufficient grounds why the plaintiffs are estopped from pleading the said replications ; and further, that, if the defendants had intended to rely on the matters in said rejoinders stated by way of estoppel, they were bound to have put forward and relied on such matters of estoppel in their said defence ; and that, having allowed the plaintiffs to file replications to said defence, they have lapsed their time, and cannot now, by the further subsequent pleading, rely on said alleged estoppel.

estoppels, if any, are by matters in *pais*, and yet the allegation is, not that the plaintiffs did an act, but that they did not do an act, namely, appeal. The defences did not rely on that as matter of estoppel. Therefore the defendants cannot so rely on it in their rejoinders; for matters of estoppel must be pleaded as early as possible: 1 *Saund. Rep.*, p. 325, *a*, note *d*; *Vooght v. Winck* (*a*). If the Town Council had no jurisdiction to impose the rates, then the whole proceedings were a nullity, and the plaintiffs are entitled to bring this action of replevin: *Sabourin v. Marshall* (*b*); *Weaver v. Price* (*c*). Under the Belfast special Acts (8 & 9 *Vic.*, Loc. and Per., c. 142, and the 16 & 17 *Vic.*, c. 114) the Town Council had no jurisdiction to impose these rates on these particular premises. Under the 8 & 9 *Vic.* (Loc. and Per.), c. 142, ss. 66, 257, and 276, the Town Council have no power to impose rates on districts within the borough of Belfast, provided that they are "set out *and* lighted *and* watched." But the plaintiffs' premises are situate in a district which is not lighted and watched, and are also exempted from the rates on account of being situated in a demesne of not less than forty acres (16 & 17 *Vic.*, c. 114, s. 6). The plaintiffs were not confined to the remedy by appeal: *Milward v. Caffin* (*d*); *Governor of the Poor of Bristol v. Wait* (*e*).—[FITZGERALD, J. Is not the ground of the English decisions on the Poor-laws this—that the occupation is the foundation of the jurisdiction; and that, unless there is occupation, there is no jurisdiction?]
—Yes; and the Justice who issued the warrant is not more protected than the Town Council: *George v. Chambers* (*f*). An action of replevin may be maintained against a person who improperly issues a warrant under which another's goods are distrained: *Jones v. Johnson* (*g*).

Counsel also cited *Gilbert on Replevin*, p. 138; *Scadding v. Lorant* (*h*); *Woods v. Reed* (*i*); *Siebold v. Roderick* (*h*); *Lord Amherst v. Lord Somers* (*l*); and *Fernley v. Worthington* (*m*).

(*a*) 2 B. & Ald. 662.

(*b*) 3 B. & Ad. 440.

(*c*) 3 B. & Ad. 409.

(*d*) 2 Sir Wm. Bl. 1330.

(*e*) 1 Ad. & El. 264.

(*f*) 11 M. & W. 149.

(*g*) 5 Exch. Rep. 862.

(*h*) 13 Q. B. 687; S. C., 3 H. L. Cas. 418.

(*i*) 2 M. & W. 777.

(*k*) 11 Ad. & Ell. 38.

(*l*) 2 T. R. 372.

(*m*) 1 M. & Gr. 491.

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May and Macdonogh, contra.

The 8 & 9 Vic., (Loc. and Per.,) c. 142, s. 66, gives the Town Council of Belfast a jurisdiction co-extensive with the local limits of that borough; and their duty is to make, in the first instance, a rate extending over the *whole* borough, and then persons exempted by sections 348 and 351 can put forward their claims. The appeal code extends from section 361 to section 370. No appeal from the decision of the Quarter Sessions is given; so that they are exclusively to determine on the matter of fact as to a man's liability to, or immunity from the rate; and the matter, being properly one of appeal, does not enable the plaintiffs to maintain an action of replevin or trespass. The plaintiffs should have appealed, if the Town Council had jurisdiction to impose the rates; if they had not jurisdiction, an action of trespass might be brought, but not replevin: *Marshall v. Pitman (a)*; *Newbould v. Coltman (b)*; *The Churchwardens of Birmingham v. Shaw (c)*; *Wilson v. Weller (d)*; *The Queen v. Bradshaw (e)*.—[LEFROY, C. J. Every parishioner is liable *prima facie* to pay the poor-rate.]—So we say here; and that the plaintiffs were bound to show their exemption: *Luton Local Board of Health v. Davis (f)*; *Pedley v. Davis (g)*. The Town Council had jurisdiction to impose the rate; it was *prima facie* valid, and, not having been appealed against, the Justices were bound to enforce it. The principle established in these cases is also to be found in *Fawcett v. Fowles (h)*; *Ex parte May (i)*; *The Queen v. Justices of Kingston and Philips (k)*. There being no want of jurisdiction in the Town Council to impose the rate, the Justice had authority to determine the only fact which he did determine: *Brittain v. Kinnaird (l)*; *Cave v. Mountain (m)*; *The*

(a) 9 Bing. 595.

(b) 6 Exch. Rep. 169.

(c) 10 Q. B. 868: S. C., 2 Dowl. N. S. 783.

(d) 1 Br. & Bing. 57; S. C., 3 B. Moore, 291.

(e) 29 Law Jour., N. S., Mag. Cas. 176.

(f) 29 Law Jour., N. S., Mag. Cas. 173.

(g) 10 C. B., N. S. 492.

(h) 7 B. & Cr. 394.

(i) 2 B. & Sm. 426.

(k) 1 Ell., Bl. & Ell. 256.

(l) 1 Br. & Bing. 432.

(m) 1 M. & Gr. 257.

Queen v. Bolton (a). Estoppels are not odious, save where they are sought to be made out and raised by implication: *Palmer v. Ekins* (b) The estoppel *in pais* has been properly relied on in the rejoinder: *Sanderson v. Collman* (c); *Doe v. Huddert* (d); *Doe v. Wright* (e); *Ingleton v. Burgess* (f); *Outram v. Morewood* (g).

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Chatterton, in reply.

If there be a *prima facie* occupation of ratable premises situate within the area of local taxation, then the case becomes one of personal or exceptional liability; and the party is bound to take his remedy by appeal. But if he is not in occupation of ratable premises; or if, being in occupation of ratable premises, they are situate outside the limits of local taxation, then it is open to him to bring an action, and the question need not be determined on appeal: *Milward v. Caffin* (h); *The Governor of the Bristol Poor v. Wait* (i). No doubt, any matter which is within the jurisdiction, either of the Town Council, who are the rating body, or of the Justices who are called upon to decide, and act judicially, cannot be called in question in an action of this kind. But the plaintiffs are entitled to bring this action, because the proceedings were altogether *ultra vires*; and, being therefore null and void, cannot be made valid by anything occurring subsequently. The English decisions establish that, if the act of the rating body be void, it cannot be cured by the proceeding before the Justices to recover the void rate. The jurisdiction of the Justices does not then apply; and their act, if they determine the case, may be set right in an action of replevin, or called in question in an action of trespass. It is clear from the statutes that the Town Council entirely exceeded their powers. By the 8 & 9 *Vic. (Loc. & Per.)*, c. 142, s. 66, the Act is to be put in force within the borough, "or any *part* thereof,

(a) 1 Q. B. 66.

(b) 2 Lord Ray. 1553.

(c) 4 M. & Gr. 220.

(d) 4 Dowl. 436; S. C., 2 C., M. & K. 216.

(e) 10 Ad. & Ell. 763.

(f) Carth. 65.

(g) 3 East, 346.

(h) 2 Sir W. Bl. 1330.

(i) 1 Ad. & Ell. 264.

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subject to the provisions hereinafter contained." The provisions, subject to which the Town Council are empowered to put the Act in force within the district in which the plaintiffs' premises are situate, are contained in section 276, which makes it necessary to light and watch, as well as to set out the district, before a rate is imposed upon it, otherwise great injustice would be done; and in section 67, the Legislature itself has taken the distinction between districts which are set out *and* lighted *and* watched, and those which are only set out *to be* lighted and watched at some future time. The 348th section does not give power to impose a rate on all premises within the territorial limits of the borough; whether the district in which these premises are situated be or be not lighted and watched. The large terms of that section are controlled by those of the 66th and 276th sections. In section 353 rating and payment are used as exactly co-extensive; and, since the Town Council have the fullest powers of raising money by taxation, there could not be any difficulty in obtaining the funds necessary to light and watch the district before the rate was imposed on it. Besides they need not light and watch any district until they have raised the money.

Cur. adv. vult.

T. T. 1864. **FITZGERALD, J.**
June 23.

This case comes before the Court upon a demurrer to a rejoinder; was argued on the 3rd and 4th of May 1864; and raises a question of considerable importance. The action was, in form, replevin, in which the plaintiff complained that the defendants, on the 20th of May 1862, in a certain factory of the plaintiffs, situate at Linfield road, near Belfast, took and unjustly detained the goods of the plaintiffs.

The defence states that, on the 1st of January 1854, the Town Council of Belfast made a rate for the year 1854, and then avers that at the time of making the rate the plaintiffs were the occupiers of two distinct sets of tenements in respect of which they were liable to the rate; that, after the making of the rate, the Town Council caused public notice to be given of it, and further directed that it should be payable on the 25th of January 1854;

and that the plaintiffs did not appeal against the rate. The defence then proceeds to state in a similar form the making of several other rates, with similar averments; and it goes on to state that, after the making of the respective rates, payment of them was duly demanded from the plaintiffs; that the plaintiffs failed to pay the rates; that they were summoned before the Justices to show cause why they should not pay the rates; that they failed to do so; that the Justices made orders for the payment; that the plaintiffs did not appeal against those orders; that, on the 10th of May 1862, Mr. Lyons, one of the defendants, issued his warrants to the other defendant, Crossett, to levy by distress the amount of the rates; and that Crossett did seize the plaintiffs' goods, according to the exigency of the warrants.

The defence then is a justification of the taking the goods in question under the warrant for certain rates made by the Town Council of the borough of Belfast.

To that defence two replications have been filed; and it is upon the first of these that the question arises. The first replication is, that the plaintiffs' tenements were not, at the times when the rates were made, situate within a district in the borough set out, and lighted, and watched, as required by the statutes.

The question seems to me to be, whether the first replication presents in point of law a good answer to the defence. In the course of the argument it was agreed, that the determination of that question depends on the consideration whether the act of the primary tribunal, in making the rates on the plaintiffs' premises, was illegal, as being beyond their jurisdiction, and therefore null and void. And it was conceded that if the Town Council of Belfast had acted within their jurisdiction, though erroneously, the alleged non-liability of the plaintiffs to the rate was matter of exemption only, and was the subject-matter of an appeal; and, on the other hand, it was admitted that if it appeared that the Town Council of Belfast had acted without jurisdiction, the rate so far was illegal and void, and the question was properly raised in an action of replevin.

Although a number of cases were brought under our consideration,

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the argument turned upon the Belfast Special Acts. The first of those Acts is the 8 & 9 *Vic.* (Loc. & Per.), c. 142, which, after reciting in its preamble certain other Acts relating to Belfast; and that it would tend to the benefit of the inhabitants of that borough, and to its improvement, if new streets were opened, and other improvements effected; and that it was expedient to repeal two prior Local Acts; by the first section repeals those two Acts, one of them being the 40 *G.* 3 (*Ir.*). It then proceeds to incorporate, by section 3, the provisions of the 3 & 4 *Vic.*, c. 108, with certain exceptions; and by section 4 constitutes the Town Council of Belfast the tribunal to carry the Act into operation. I should mention, in passing, that a subsequent clause (9) transferred to the Town Council of Belfast "the debts, contracts, engagements, and liabilities" of the Commissioners, whose duty it was to have carried out in that borough the previous Act, 40 *G.* 3 (*Ir.*).

I pass at once to the 66th section. It enacts "That the limits of "this Act shall be the borough of Belfast for the time being; and "this Act shall and may be put in force within the said limits or "any part thereof, subject to the provisions hereinafter contained."

From the 66th I pass at once to the 257th section, observing that the intermediate sections confer upon the Town Council of Belfast very large powers for the general improvement of the borough, as well as extensive police powers to be exercised within the limits of the borough.

Section 257 provides "That it shall be lawful for the Council "from time to time to cause the several streets, roads, lanes, "passages, and other places within the limits of this Act, or such "of them as they shall think proper, to be lighted with gas, oil, or "otherwise, at such times and in such manner as they shall think fit, "and to provide, lay, and affix such lamps, lamp posts, lamp irons, "pipes, and other works as may be necessary for that purpose."

Previous sections had given powers, co-extensive with the limits of the borough, enabling the Town Council to enter into contracts for the lighting of the whole or of part of it.

Section 276 enacts "That it shall be lawful for the Council, from "time to time, to declare and direct what districts within the

"limits of this Act shall be lighted and watched under the authority
 "of this Act, and in like manner from time to time to declare and
 "direct whether any and what districts shall be added to the parts
 "already lighted and watched; and the districts so appointed to be
 "lighted and watched as aforesaid, and the districts from time
 "to time added thereto, shall be considered as the district to be
 "lighted and watched by the Council under the authority of this
 "Act, until the same shall be altered by the Council; and the
 "owners or occupiers of any messuages, houses, shops, buildings,
 "or premises not within the district so from time to time set out
 "and lighted and watched shall not be subject or liable to the
 "payment of any of the rates by this Act directed to be raised."

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The whole question arises upon that provision, which, it will be perceived, does not limit the taxing powers or rating powers of the Town Council, but simply directs that the owners or occupiers shall not be liable to the payment of the rates to be made under this Act unless the district is set out and lighted and watched.

The 348th section enacts "That for the purposes of defraying the
 "costs and expenses of carrying this Act, and all the powers and
 "provisions thereof, into execution, it shall be lawful for the
 "Council once in every year after the passing of this Act, to be
 "computed from the 1st of January in each year, or oftener if they
 "shall think it necessary, to make one or more rate or rates,
 "assessment or assessments, upon the occupiers of all houses,
 "buildings, tenements, quays, wharfs, and other hereditaments
 "within the limits of this Act, according to the annual value of
 "the same, so as such rates or assessments do not exceed in any
 "one year the sums hereinafter mentioned; that is to say, &c., and
 "such rates shall be applied in the manner and subject to the
 "provisions in this Act contained: provided always, that no
 "person shall be rated for or in respect of any arable, meadow,
 "pasture, or woodland, or any stable or building *used for the*
 "*purposes of husbandry only.*"

The 276th section contains an exemption from the payment of rates of the owners or occupiers of any houses, messuages, shops,

T. T. 1864. buildings, or premises not within the district set out, and lighted
Queen's Bench and watched; and the 348th section contains a further exemption
MURPHY of all persons in respect of "any arable, meadow, pasture, or wood-
v. "land, or any stable or building used for the purposes of husbandry
LYONS. "only."

But these two exemptions are subject to the general power of the Town Council of Belfast to rate all tenements of the required description within the limits of the Act. Section 351 also requires attention, for it too is an exempting clause:—"That no person shall be rated for or in respect of any church, chapel, meeting-house, or other building erected and used for public worship, or any building exclusively used for the gratuitous education of the poor, or for the purposes of public charity."

It seemed to be conceded in the course of the argument that if the party, who alleged that he was not liable for rates made by the Town Council of Belfast, came within the proviso at the conclusion of section 348, or within section 351, his claim to non-liability would be a claim of exemption simply, and should be raised by appeal and not by an action of replevin. The appeal sections are the 364th to the 369th; and certainly there is given to the parties liable to these impositions the largest powers of appeal: whether to show the illegality of the entire rate; or to show an exemption on the ground of inequality, unfairness, incorrectness of the valuation, or any other ground. The 369th section enacts "That the Court of Quarter Sessions, and the Justices in Petty Sessions assembled respectively, shall in any appeal against any rate made under the authority of this Act have the same powers of amending or quashing the rates for the relief of the poor within their several jurisdictions upon appeals against such rates, and shall likewise have respectively in any appeal against any rate made by authority of this Act the same power of awarding costs to be paid by or to any of the parties to an appeal, and of recovering such costs, as are now vested in them respectively for awarding and recovering costs in an appeal against any rate for the relief of the poor within their several jurisdictions."

In addition to the extensive power of the Sessions enabling them

to quash a rate if apparently illegal, or to deal with a case of inequality or unfairness, or to amend the rate by striking out the name of an individual who is not liable to pay anything, the rate is to be imposed on the tenement according to the poor-law valuation, which is the general valuation now used to ascertain the amount which every party is bound to contribute.

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I have now only to advert to one other section in this Act—the 383rd:—“That the money which shall arise from said rates to be raised and levied, and all other moneys to be received by the Council under this Act, shall be applied in the first place, in payment of the expenses of obtaining and passing this Act, or preparatory or incident thereto: secondly, in payment of the interest of the moneys borrowed on mortgage by virtue of certain recited Acts; thirdly, in defraying the expenses of lighting, paving, cleansing, sewerage, watching, and regulating the streets within the limits of this Act, and of improving the same, and in carrying the several purposes of this Act into execution:”—that includes also the payment of local police whom the Town Council of Belfast were under previous sections empowered to raise, and authorised to pay.

In the argument several authorities were referred to, but the case of *The Churchwardens of Birmingham v. Shaw*(a) was principally relied on by the plaintiff. In that case a similar question arose, as to whether the objection to the rate was the subject-matter of appeal, or whether it might well be made the subject of an action? And after dealing with the first question, whether the Birmingham New Library Society, which sought the exemption, came within the Act, Lord Denman then proceeded to say:—“We are driven, therefore, to consider the second ground on which the rule is supported, whether namely, as regards the present rates, the Society is deprived of the benefit of its exemption, because it has not appealed against them (p. 878) . . . (p. 879). This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application.” The Chief Justice then proceeded to deal with the

(a) 10 Q. B. 868.

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right of appeal; to show that "if the primary (p. 880) Court has gone beyond those limits its act is void;" and to show that the party aggrieved may take the appeal whether his claim is merely a claim of exemption, or the rate is entirely void, though he might embarrass himself by making a claim of exemption if his case is that the rate is entirely void. "Now it is not disputed," said Lord Denman (pp. 880, 881), "that he was the occupier of the premises "in respect of which he is rated, nor that they are within the "the parish, nor is any question made as to the beneficial nature of "the occupation; but the objection is, that the statute exempts "from the rate by reason of the purposes for which the occupation "is had; and it is said that the effect of that exemption is to take "the premises, for the purpose of rating, out of the parish, and so "out of the jurisdiction of the Justices, who are allowing a rate "made for the parish. But we think this mode of stating his case "cannot be sustained: if it could, the same mode might be adopted "wherever the question was, whether the occupation was beneficial "or not; if there be no beneficial occupier, the land, for the "purposes of the rate, might equally be said not to be within the "parish, because it ought not to be included within the rate: yet, "so far as we know, this question has always been raised on "appeal; and the distinction has been between the question, "whether occupier or not absolutely, which has been tried by "action, and, whether beneficial occupier or not, which has been "tried by appeal. And this seems the reasonable test. As soon as "the land is shown to be in the parish, and A B to be the occu- "pier, the case is *prima facie* brought within the statute of "*Elizabeth*, the rate on its face is good, and jurisdiction attaches: "whether that *prima facie* case can be answered by any circum- "stances affecting the character of the occupation, is matter to be "determined by the Court of Appeal on appeal made." He then proceeded to deal with other authorities, and finally held that in that case the claim was matter of exemption. In the present case I have to consider a similar question; and it seems to me, upon the fullest and most attentive consideration that I could give to the case, that the replication discloses a cause of exemption only, and not a

failure of jurisdiction in the primary tribunal. And, secondly, I think that the plaintiff's remedy, if any, should upon the facts spread upon the pleadings have been by appeal to the Quarter Sessions, and not by an action of replevin.

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I have already called attention to the fact that the local powers of the Town Council of Belfast are co-extensive with the borough: the limit of their jurisdiction is the local limit of the borough; and the 348th section provides that they *shall* make a rate upon all the tenements of the required description within the limits of the borough. But it exempts several classes of tenements. The concluding provision of section 276 was probably introduced with a view to encourage the lighting and watching of the districts within the limits of the borough, since it provides that "the owners or occupiers of any messuages, houses, shops, buildings, or premises not within the district so from time to time set out and lighted and watched shall not be liable or subject to the payment of any of the rates by this Act directed to be raised." I am unable to bring my mind to any other conclusion than this, that that was matter of exemption only, and that the Town Council of Belfast had jurisdiction to deal with all and every of the tenements, answering the statutable description within the borough; and that if they included in the rate any one who by reason of those provisions was not liable to be rated, it was a case of exemption. No injury could be done by giving that construction to the Act, because the party aggrieved has most extensive powers of appeal, and ample time given for appealing. In some instances, he has three opportunities of appealing—namely, to the Town Council itself, to the Petty Sessions, and to the Quarter Sessions. Upon that question therefore, and without considering the rejoinder and the questions of pleading, it seems to me that the plaintiff fails in maintaining his action; because if it was a case of exemption he should have enforced it by appeal. I am to some extent fortified in this conclusion by a consideration of the previous Acts applicable to the borough of Belfast, and especially of the 40 G. 3 (*Ir.*). I have already adverted to the fact that the contracts, liabilities, and engagements of the Commissioners of Belfast, under 40 G. 3 (*Ir.*),

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have been by the 8 & 9 *Vic.* (Loc. & Per.), c. 142, transferred to the Town Council of the borough. I have looked into the powers of the Commissioners under the 40 *G.* 3 (*Ir.*), c. 37; and the rating clause (section 18) of that Act enacts that the Commissioners, "or the major part of them, shall, from time to time, make one or more equal, fair, and impartial rate or rates, applotment or applotments, upon all and every person and persons who do, or shall inhabit, hold, use, occupy, possess, or enjoy any land, ground, house, lodging, shop, wharf, warehouse, coachhouse, stable, cellar, vault, building, countinghouse, or place of carrying on business, either in co-partnership or otherwise, or hereditament whatsoever, within the said town of Belfast, or the precincts thereof." There is no exemption or qualification; and under that Act, the liabilities, engagements, and contracts of which have been cast upon the Town Council under the 8 & 9 *Vic.* (Loc. & Per.), c. 142, the rating powers are co-extensive with the limits of the borough; every person holding a tenement within its limits is liable to be rated for the purposes of that Act. Some force may also be derived from recollecting that the provisions of the Municipal Corporation Reform Act (Ireland) are, except so far as they are qualified by the provisions of the Belfast Act, in force within that borough. Upon a consideration of the terms of the Act I am unable to find any that would lead to the conclusion that the imposition of rates upon any tenement within the borough of Belfast, though that tenement might be exempted from taxation, would be illegal, so as to give any remedy except by appeal.

The second replication relies upon the subsequent Belfast Act (16 & 17 *Vic.*, c. 114), which exempts from taxation premises situate in a demesne of forty acres (section 6). It is not necessary for me further to comment on that section; for it seems to have been conceded in the course of the argument upon both sides, that, if the concluding provision in the 276th section of the former Act afforded only a ground of exemption, this would *a fortiori* also be matter of exemption only, and the subject of an appeal.

Upon the whole, I think that the replications, assuming them to be true in point of fact, do not afford an answer, good in point

of law, to the defence; and that the defendants are therefore, and without considering the merits of their rejoinder, or the point of pleading raised by the demurrer, entitled to judgment.

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HAYES, J.

I take it to be sufficiently well established by the authorities that if the Town Council of Belfast have acted without jurisdiction, or in excess of jurisdiction, in imposing the rate upon the premises of the plaintiffs, the defendants have also acted without or in excess of their jurisdiction, in issuing and executing the warrant to enforce it, and that this action may be maintained against them. But the question is, has the Town Council acted beyond their jurisdiction? and this is to be solved by a careful reference to the Acts which give and prescribe its authority.

The 66th section of the Local Act, 8 & 9 Vic., c. 142, enacts that the limits of the Act shall be the borough of Belfast, for the time being; and the Act "shall and may be put in force within the said limits, or any part thereof, subject to the provisions hereinafter contained." We are here to inquire and determine, not what are the local limits of the Act generally, but what are the local limits within and throughout which it may be enforced, for the purposes we have in hand, viz., the imposition and levy of rates; and whether those local limits have been fixed generally and absolutely, or are to be ascertained and fixed upon the performance of any and what conditions. The statute plainly contemplates that the ground within the borough limits is partly urban and partly rural. In the urban district provision is made for the widening and improving of certain old streets (section 56),—for the opening of certain new streets (section 58),—for the paving, flagging, levelling, draining, sewerage (section 72), watering, and sweeping (section 145) of all the streets. By the 220th and subsequent sections, the Council is authorised to appoint a police force, for the preservation of the peace within the borough. As there is nothing in the Local Acts to exclude the operation of the general Constabulary force, it may be fairly assumed that that Constabulary force would be amply sufficient were the rural district alone to be protected. But it is for the

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watching and general police regulation of the urban district that this special and extraordinary force is required and provided. The same principle holds with respect to lighting; and accordingly we find that, by the 257th section, the Council is authorised "from time to time to cause the several streets, &c., within the limits of the Act, *or such of them as they shall think proper*, to be lighted at such times and in such manner as they shall think fit; and to provide lamps, &c., as may be necessary for that purpose." And, by the 270th section, the Council are "empowered, from time to time, to declare and direct what districts within the limits of the Act shall be lighted and watched; and in like manner from time to time to declare and direct whether any and what districts shall be added to the parts already lighted and watched: and the districts so appointed to be lighted and watched, and the districts from time to time added thereto, shall be considered as the district to be lighted and watched by the Council, until the same shall be altered." If the Act had stopped there, there might have been some reason to contend, as the defendants' Counsel have done, that the order of Council was all that was requisite to constitute any portion of ground within the limits of the Act to be a "lighted and watched" district; and that, whether any actual lighting or watching was ever afterwards effected there, still that the inhabitants would be liable to the same imposts as those who resided within a district that actually enjoyed those advantages. But the statute, not content with enacting that the declaration and direction of the Council shall be preliminary to the lighting and watching of the district named therein, goes on to provide that the owners or occupiers of premises not within the district so from time to time set out, *and lighted and watched*, shall not be subject or liable to the payment of any of the rates to be raised. The doing of all these three matters is within the exclusive power of the Town Council; they may select their own time for doing them whenever the growth of the town shall so require; but it appears to me sufficiently clear that the doing of all three matters is a condition precedent to the Council's having any jurisdiction to tax the occupiers. It is not sufficient that the

order has been pronounced, which may possibly never be carried into effect. The district must, in the language of the Act, be also lighted and watched. The inhabitants must have a material guarantee that, if they are to be subjected to borough taxation, they shall have a *quid pro quo*, and not be left without the benefits of borough improvement.

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It has been argued by Mr. *Macdonogh* that at best this is only matter of exemption, and not of jurisdiction; and that the party aggrieved ought to have been left to his appeal from the rate. But, to say nothing of the vexation, and even injustice, that would be committed by such a course of proceeding, we have only to look to the 66th section, which gives a jurisdiction to enforce the Act, only subject to the provisions thereafter contained; and one of those provisions is that, before there be a taxation, there shall be not only a setting out of the district, but also a lighting and watching of it.

For these reasons I am of opinion that the first replication affords a good answer to the pleas, and that, so far as that is concerned, our judgment ought to be for the plaintiff.

With respect to the question raised on the demurrer to the rejoinder to the second replication, I think it is clearly with the defendants, inasmuch as the second replication is not sustainable. It is not shown thereby that there was any want of jurisdiction to make the rate. The utmost that could be contended for is, that, by the 16 & 17 *Vic.*, c. 114, s. 6, a particular exemption from being rated was provided for the owner or tenant of a forty-acre demesne, situate within a ratable district, so long as all the circumstances set forth in the Act should be found to co-exist. But, whether these do or not so co-exist, is a matter which the plaintiffs were bound to make out on an appeal against the rate.

I am therefore of opinion that, so far as that second replication is concerned, there ought to be judgment for the defendants.

O'BRIEN, J.

I concur with my Brother HAYES in opinion that, as regards the *first* replication, plaintiffs' demurrer to the second and third

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With respect to the first replication, it would appear, upon the facts as stated in the pleadings, that the premises on which the rates were made are in a district within the limits of the borough of Belfast, which district the Town Council, in pursuance of the powers given to them by the several statutes referred to, had directed to be "*lighted and watched*," but which had not been *actually lighted and watched* at the time that the rates were made.

Plaintiffs' Counsel contend that, under those statutes, the Town Council had *no* authority to impose the rate in respect of any premises which were in a district that was not actually lighted and watched; and that accordingly the rates made by the Town Council on the premises in question, and also the orders made by the Justices for payment of same, were altogether void. Defendants' Counsel, on the other hand, contend that, even assuming the statutes in question did not authorise the Town Council to impose rates on any premises in a district which was not actually lighted and watched, yet that such objection was properly the subject-matter of appeal under the statutes against the rates and orders; and that, as plaintiffs did not appeal, therefore they cannot now rely on such objection, but are precluded from impeaching the validity of the rates in this action. On this question several authorities were cited in the argument. Without referring to them in detail, it appears to me that the following principle may be deduced, namely, that where the objection to the rate is the want of jurisdiction in the tribunal which made it, then that its validity might be disputed by the rated party in a subsequent action of replevin or trespass, though it had not been appealed from. One of those cases—*Weaver v. Price* (a)—was an action of trespass against Magistrates, for issuing a warrant under which plaintiff's goods were distrained for a rate made by the churchwardens of the parish of "O," upon the plaintiff, as the occupier of lands in that parish. It appeared on the trial that plaintiff had no lands in that

(a) 3 B. & Ad. 409.

parish, but that the lands in respect of which he was rated were situate in the parish of "E;" and there was a verdict for plaintiff, under the direction of the Judge, who told the jury that the Magistrates had no jurisdiction to order the rate to be levied on plaintiff, if he had no lands in the parish of "O;" and that in such cases the action was sustainable. Defendant's Counsel applied for a new trial, on the ground that plaintiff's proper remedy was by appeal, and not by action; and, further, that he should have appeared before the Magistrates to show cause against the order which they made; but the Court refused even a conditional order, Parke, J., observing on the distinction between the case in which the objection was one that might be taken by appeal, and the case before them, in which there was no rate affecting plaintiff's lands in the parish of "E;" and Lord Tenterden stated that there was not in that case any rate whereby plaintiff could be duly assessed to the relief of the poor of the parish of "O;" for he was not the occupier of any land in that parish. I think that the principle of that case is applicable to the question now before us. Other cases have been cited, in which it was held that the objection taken to the rate was only available on appeal, and could not be relied on in a subsequent action; but in which it appeared that the rated premises were situate in a district over which the tribunal imposing the rate had clearly a rating power, and that the ground of objection to the rate was either personal to the party rated, or arose from something peculiar in the extent or character of the rated premises, or from the use made of them (as, where they were held for charitable or public purposes). In such cases, the claim for exemption was properly held to be only ground for appeal. When, however, as in the case now before us, the objection is, that the rated premises are in a district over which the tribunal had not any authority to make any rate, I think the clear result of the authorities is, that the party objecting to the rates is not bound to appeal against them, but may, without appealing, treat the rates and orders made thereon as nullities, and bring his subsequent action if they should be enforced.

The next matter for consideration is, whether, under the statutes relied on, the Town Council were authorised to make these rates on

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premises in a district which the Town Council had *directed* to be lighted and watched, but which was not actually lighted and watched at the time the rates were made. The 66th section of the Belfast Act of 1845 declares the limits of the Act should be the limits of the borough, and that the Act might be put in force within said limits, "subject to the provisions hereinafter contained." The jurisdiction of the Town Council over any part of the borough is therefore subject to such subsequent provisions of the Act; and plaintiffs' Counsel rely on one contained in the 276th section. That section empowers the Town Council to declare and direct from time to time what districts within the limits of the Act should be *lighted and watched* under the authority of the Act; but it then expressly enacts that the owners or occupiers of any premises not within the district *so from time to time set out, and lighted and watched*, should not be subject or liable to the payment of any of the rates by the Act directed to be raised. That section appears to take a distinction between premises in a district which was actually lighted and watched, and those in a district which was not so; although the Town Council had declared and directed it should be. The 348th section empowers the Town Council to make rates on all premises within the limits of the Act; but that power is clearly subject to the restriction imposed by the later provisions to which I have referred in section 276. When the Council make an order directing any particular district to be lighted and watched, that district would, for some purposes, be brought within the limits of the Act, and of their jurisdiction; but it would not, in my opinion, be brought within their jurisdiction for rating purposes at all until it was actually lighted and watched. The effect of that provision, with respect to a district which had been directed to be, but had not in fact been, lighted and watched, was not to give the owners of property within such district a mere personal exemption, or an exemption by reason of the premises being arable, or used for pasture, &c. (as mentioned in section 348), or by reason of their being used for religious or charitable purposes (as mentioned in section 351). The provision applies generally to all the premises within such district; and its effect, in my opinion, is, that the Town

Council have no jurisdiction to impose a rate on any of those premises until the district is actually lighted and watched. According to this, the objection to the rate in question would be of a somewhat similar character to that in *Weaver v. Price* (a), already mentioned, namely, that the premises in respect of which the rate was made were situate in a district over which the tribunal imposing the rate had not any rating power; and I think we should hold, as was done in that case, that the rate was void, and that its validity (although not appealed from) might be questioned in this action. It would also follow that the alleged case of estoppel made by the rejoinders to the first replication cannot be sustained.

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With respect to the second replication, and the rejoinders thereto, the case is different. That replication is grounded upon the 16 & 17 Vic., c. 114, s. 6, which provides that, if there be a demesne within the borough, of the extent of forty acres or more, in the occupation of the owner or his tenant, and in which no streets should be laid out, &c., or no dwelling-houses built—then that the owner or occupier should not be rated in respect of such demesne, except he requires so to be. The objection taken to the rate in that replication is not on the ground that the rated premises are in a district over which the Town Council had no rating power, but is grounded on the extent and nature of the rated premises, and on the manner in which they are used;—a ground of objection which, according to the authorities already referred to, is only the subject-matter of appeal, and cannot be relied on in a subsequent action as affecting the validity of the rate. I think therefore that, as regards this second replication, the demurrers taken by plaintiff to the second and third rejoinders filed thereto should be overruled; and it does not appear to me that this decision is at all inconsistent with the reasons which I have already stated for giving judgment in plaintiffs' favour, as regards the first replication, and the second and third rejoinders filed thereto.

LEFROY, C. J.

In this case I am of opinion, with my Brothers O'BRIEN and

(a) 3 B. & Ad. 409.

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HAYES, that this is not a case of exemption, but of an original want of jurisdiction in the Town Council of Belfast to impose the tax ; and I have come to that conclusion without having recourse to the numerous cases which have been cited, but upon the settled rule of construction of clauses in Acts of Parliament. That rule was very well established so long ago as the time of *Plowden*, and has been adopted ever since. It will furnish for this case a clear and simple rule by which we may be guided. The rule is this:—When a right is created by a clause in an Act of Parliament, and that right is a right to lay on a tax, the first rule is that the right which it is alleged imposes a tax on the subject must be created by clear unequivocal terms: we are not to tax the subject by ambiguous language. Secondly, the criterion by which we are to find in the clause a clear, unequivocal right to lay a tax on the subject, where the very clause itself contains that which defeats the right to lay on the tax,—that is a very different thing from such a proviso being contained in a subsequent clause. Here the 66th section of the 8 & 9 Vic. (Loc. & Per.), c. 142, contains the exemption, for it says:—“This Act shall and may be put in force within the said “limits or any part thereof, *subject to the provisions hereinafter “contained;”* and the provisions thereafter contained take away the right to lay on the tax, just as clearly as the tax is laid on in every other case, but this excepted one. But with respect to the excepted case, the body of the clause itself contains the exemption. Otherwise, *Plowden* says, if the section itself lays on a rate without qualification, exception, or distinction, the rate then is laid on in all cases generally, and it is for the party who would take himself out of that, to take himself out of it. But if he does so by a proviso in a subsequent clause that operates as an exemption, it just makes all the difference. If this be an exemption, the remedy should have been by appeal. But if there was an original want of jurisdiction, it is not a case for appeal or exemption; but it is a case in which the tax never was laid on by the section itself, for the section itself says that the tax shall be imposed “subject to the provisions hereinafter contained.” Therefore you have in the very body of the section itself that which takes out of it everything that is to be found

in those subsequent provisions for exemption; and that exactly T. T. 1864.
brings it within the law as laid down in the case in *Plowden*, *Queen's Bench*
to which I have adverted, and which has been so long acted
upon. And the simple question is, whether in the very terms
giving power to lay on the tax there is not, in the body of the
section which gave the right, enough to defeat the jurisdiction
to lay on the tax. Upon that short ground, which takes the
case out of the distinction between exemption and want of juris-
diction, I am of opinion that in this case there never was a
jurisdiction created to lay on this tax. According to the rule
of law, the jurisdiction must be created beyond a doubt; and
therefore the Town Council of Belfast acted without jurisdiction in
this matter.

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Upon these grounds I am of opinion that there was an original
want of jurisdiction to lay on the tax, according to the rule of
construction of Acts of Parliament,—taking the distinction between
the cases where the exemption is made by the subsequent sections,
and where it is in the body of the clause authorising the laying on
the tax. Therefore in this case the plaintiff had a right to sustain
the action for his goods which were illegally distrained, and the
action may in form be either in replevin or trespass.

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BARRY v. O'BRIEN.

(Common Pleas.)

Jan. 13.

A brought an action of trespass and trover against B, who, after service of the writ of summons and plaint, but before filing his defence, returned to the plaintiff the goods, the seizing of which were the substantial cause of action. He afterwards pleaded, justifying the seizure of the goods under a civil-bill decree. The plaintiff then applied to the Court for an order that the defendant should pay him the costs of the suit up to the time of the return of the goods, on the ground that, inasmuch as the parties resided in the same civil-bill jurisdiction, and the value of the goods did not exceed £5, the plaintiff would be deprived of his costs in the event of the Judge at the trial refusing to certify.

THIS was a motion that the defendant should be ordered to pay to the plaintiff the costs incurred in this cause, up to the time of returning the goods mentioned in the summons and plaint, and also for the costs of the motion. The action was one of trespass for entering the plaintiff's dwelling-house, and also for the conversion of plaintiff's goods. The defendant denied the cause of action in the first and second counts. He also pleaded to the second count a plea justifying the seizure under a civil-bill decree against one Michael Barry; and alleged that the goods were the goods of Michael, and not of the the plaintiff. The plaintiff in his affidavit stated that the goods were the property of the plaintiff, and were of the value of about £5; that on the 2nd of November the goods were returned, after having been detained by defendant from the 17th of September previous. This was two days before filing the defence. A notice was served by plaintiff on defendant, asking for costs up to the time of the return of the goods. The defendant on the other hand alleged that the goods in question belonged to the party against whom he had levied, but that he now returned them for peace sake. It was also stated that a similar action had been brought against the defendant, in the Queen's Bench, by the plaintiff's mother, who claimed a portion of the goods seized under said decree. It was also stated that the plaintiff, his brother Michael, and his mother, all lived together in the house where the seizure took place; and that the goods were returned in the middle of October. The plaintiff stated that he was not at home when the goods were returned.

Held, that the motion should be refused.

Held also (CHRISTIAN J. *dubitante*), that independently of the question of merits, the Court had no jurisdiction to grant such an application.

P. McKenna, in support of the motion, contended that, inasmuch as the plaintiff, in case he proceeded with the action, would, even if he succeeded, incur the burden of his own costs, in case the Judge refused to certify, he ought not to be forced to go on; and that the only way in which justice would be done between the parties was by granting this motion. Under the old practice a verdict for one shilling would have carried full costs. It was not so now. The verdict should exceed £5 to entitle the plaintiff to costs.—[MONAHAN, C.J. You were not bound to take back the goods.]—In the case of *Lucas v. The London Dock Company* (a) goods had been consigned to the plaintiff, and warehoused with defendants. A claimant having appeared, the Company required an indemnity from the plaintiff, which he refused to give, and brought trover, and claimed special damage for the detention. The Company having applied for an order under the Interpleader Act to bar the claimant, who did not oppose, an order was made, that on the Company undertaking to deliver up the wine, if the plaintiff should accept the same, the action should be discontinued, on payment of costs by the defendant; and that in case the action proceeded it should be limited to the special damage.—[CHRISTIAN, J. Have you any authority to show that the value of the goods returned after the commencement of an action of possession can be deemed a recovery in the action?](*Palles* referred to *Dimsdale v. The London and Brighton and South Coast Railway Company* (b) as a direct authority the other way.)—The plaintiff ought not to be forced to go on on the chance of a certificate. This case was proper to be brought in the Superior Court, notwithstanding the residence of the parties within the same civil-bill jurisdiction. If the defendant would undertake not to object to the granting of such a certificate it would alter the case.

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Palles, contra.

This motion is unprecedented. The case referred to has no application. There the defendant sought to impose terms on the plaintiff, and could only do so by submitting to pay costs. Here the

(a) 4 B. & Ad. 378.

(b) 11 W. R. 729.

H. T. 1865. *Common Pleas.* plaintiff voluntarily takes back the goods and tries to coerce the defendant. The plaintiff admits the goods were only worth about £5. The plaintiff has no merits, and it is improbable that the Judge would certify. The Court has no jurisdiction to make this order, and thus dispense with the protection which the law has given the defendant, as regards costs.

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M'Kenna, replied.

MONAHAN, C. J.

We have no doubt as to the rule which we ought to pronounce upon this motion. We all think that this application should be refused. This was an action brought for the recovery of damages in respect of the wrongful seizure of goods under a civil bill decree. I will assume, for the sake of argument (for nothing will turn on the truth or falsehood of the conflicting statements in the affidavits) that the goods were not returned till *after* action brought. *Mr. Palles* says that they were returned *before* the commencement of the suit. But I consider that fact to be quite immaterial, inasmuch as it was the joint act of both parties; the plaintiff accepted the goods, no one forcing him to do so. Such being the state of things, the defendant pleads that the goods were the property of a third person, against whom the decree had issued, and he justified accordingly. It is impossible for us, on a motion, to decide the truth or falsehood of this plea. That is the question to be tried by the jury; and if the plaintiff chooses to take issue on this, and go to trial, we cannot prevent him. It might be that we would have jurisdiction to prevent the defendant from *forcing* the plaintiff to go on to trial, having regard to the fact of the return of the goods; but if *Mr. M'Kenna's* client (the plaintiff) chooses to go to trial, we cannot restrain him. But the motion here is that, without further inquiry, we should order the defendant to pay the costs of this action, upon the plea that the plaintiff, if he goes to trial, can only recover nominal damages, and as both parties reside in the same civil-bill jurisdiction, that he will be unable to recover his costs. But it must be recollected that, if it should turn out at the trial that these goods were the property not of the plaintiff, but of the real

debtor in the civil-bill decree, he will have to pay the defendant a large sum of costs. So I am clearly of opinion that the motion cannot be entertained. The plaintiff has alleged that this is a false plea: Mr. *Palles*, on the part of his client, states the contrary, and we must give him the benefit of believing the truth of the counter statement. And if we cannot give costs to the plaintiff, because of the falsehood of the plea, how can we do so upon the assumption that the Judge at the trial would refuse his certificate for costs? The acceptance of the goods was the plaintiff's act. If, on the other hand, it were shown at the trial that the acceptance of the goods was the act of the mother or servant of the plaintiff, fraudulently procured by the defendant, the Judge would have jurisdiction to grant a certificate to entitle the plaintiff to costs, notwithstanding the small amount of the verdict.

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I am therefore of opinion that there are no grounds for granting this motion, and that it must be refused with costs.

KEOGH, J., concurred.

CHRISTIAN, J., also concurred in holding that the motion should be refused with costs, on the merits; as upon the plaintiff's own estimate the value of the goods did not exceed £5; and the Judge at the trial would never have certified; but he was not satisfied that in a proper case the Court would not have had jurisdiction to compel the defendant to pay the plaintiff's costs.

DONAHOE v. KEOGH.

Jan. 19.

THIS was a motion to set aside the second defence to the first and third counts of the summons and plaint, as embarrassing. The first count alleged that the defendant, being one of her

Where, in an action against a Justice of the Peace for assault and false imprisonment, the defendant complained that he did the act complained of in the execution of his duty as such Justice of the Peace, and with respect to matters within his jurisdiction as such Justice—

Held, that the defence was embarrassing, for not setting forth facts to show the grounds of the alleged jurisdiction.

H. T. 1865. *Majesty's Justices of the Peace for the county of Longford, on the 21st of June 1864, assaulted the plaintiff, and caused the plaintiff to be imprisoned, and apprehended, and seized, and laid hold of and handcuffed, &c., and unlawfully imprisoned, &c., and caused plaintiff to be unlawfully committed to a certain gaol, &c., and ordered plaintiff to be detained in prison for three months, &c., &c.*

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The second count alleged that the defendant committed the above acts maliciously, and without reasonable or probable cause.

The third count was an ordinary count for assault and false imprisonment.

The defendant pleaded to so much of the first count as complained that defendant caused plaintiff to be unlawfully committed to prison, and directed plaintiff to be so imprisoned, that, before and at the time of doing said acts, the defendant was and still is a Justice of the Peace in and for the county of Longford; and that said acts and each of them were done by said defendant in the said county, and not elsewhere, in the execution of his duty as such Justice, and with respect to a matter within his jurisdiction as such Justice; and the defendant, in doing said acts and every of them, acted in the execution of his duty as such Justice, and not otherwise; and that said acts and each of them were *not* so done maliciously, without reasonable and probable cause.

The defendant pleaded similarly to the third count.

Serjeant *Armstrong* and *M. Morris*, in support of the motion, contended that, since the Common Law Procedure Act, the facts, to ground the alleged jurisdiction, should have been specially stated. The case was analogous to one of a plea of privileged communication, whereas the facts must now be fully stated.

Sidney and *Dowse*, contra, contended that such a form of pleading as sought for by the other side would amount to a statement of the evidence, and would therefore contravene an elementary rule of pleading. The plea is a good defence under the 12 *Vic.*, c. 16, s. 1.

MONAHAN, C. J.

These defences must be set aside. I rest my opinion upon the following grounds:—It is admitted that this is the first instance in which pleas of this description have been filed; and I agree with Mr. *Sidney* and Mr. *Douse* that defences of this sort, if properly framed, may be a good answer to the first and third counts, though they may not show, as a matter of fact, that the defendant was justified in doing the acts complained of; for it being admitted that, under the statute referred to, an action of trespass would not lie against a Justice for acts over the subject-matter of which he had jurisdiction, but only a special action on the case, founded on express malice, I cannot doubt that such defences as the present would, if properly framed, be good in point of law; and I do not mean to decide that, even in their present form, these defences would not be good on demurrer. But, having regard to the terms and the spirit of the Common Law Procedure Act, I think it impossible to avoid regarding these as embarrassing defences, and as having been framed in a manner inconsistent with the pervading principle of that Act, which requires that the defendant, through the medium of his pleading, must show the Court, at an earlier stage of the cause, the nature of his defence, instead of disclosing for the first time at *Nisi Prius* the particular state of facts upon which he relies, as having given him jurisdiction over the *subject-matter*, although he may not have had jurisdiction to do the *particular* act complained of. I therefore think that it is more consistent with the present rules of pleading that he should be required to do that in the first instance, than that this matter should be left at large until the trial. I do not see upon what principle the present case can be distinguished from an ordinary action of trespass against a constable, for arresting a man and putting him in gaol. There the defendant may plead that a felony was committed by a person unknown, and that he had reasonable grounds for suspecting the plaintiff. The reasonableness of his suspicions is a mixed question of law and fact; and it is for the Court to say whether the alleged grounds are sufficient; and therefore it is more convenient that, in an action of trespass, where the defendant always was obliged to

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plead his defence specially, he should set out the facts on which he relies for giving him jurisdiction over the subject-matter. We must therefore set aside the defences to the first and third counts, unless the defendant is prepared to amend, by setting out the facts in question. It is impossible that the defendant can be embarrassed by this course of pleading, as he will only have to state the facts upon which he relies; and the Court will be enabled to pronounce judgment thereon, on demurrer, instead of on a bill of exceptions.

Therefore, we are of opinion that the pleas should be set aside, with liberty to the defendant to amend, if he chooses to do so, by stating the facts which gave him jurisdiction.

BURKE v. O'CALLAGHAN.

Feb. 3.

A having sued B in the Civil-bill Court, for an alleged debt of £34, a settlement was come to, whereby it was agreed that B should pay to A £20 in cash, and should secure the balance by the joint and several promissory note of himself and C, and should also pay 10s. costs. B, in consequence of this arrangement, did not appear at the hearing of the civil-bill, and A got a decree, which he put into execution. B having sued A for breach of the express contract—

THE summons and plaint stated in substance, that on the 14th of September 1864 the plaintiff was served with a civil-bill process, at the suit of defendant, for £34, due on foot of plaintiff's and one Denis Sullivan's promissory note, dated 1st of July 1864; that the defendant applied to plaintiff for the purpose of settling the amount due on foot of said note; and that it was finally agreed to by the plaintiff and defendant that plaintiff should pay the defendant £20 in cash, and should deliver to him the plaintiff's and the said Denis Sullivan's joint and several promissory note at three months, for the sum of £14. 10s., being the balance due on foot of said note, and 10s. costs; and which sum of £20 and said note defendant agreed to accept and receive in full discharge and satisfaction of defendant's claim on foot of said note of 1st of July 1864, and to stay all proceedings on said civil-bill process; that plaintiff accordingly paid said sum of £20, and delivered to defendant said

Held, upon demurrer to the special count, that the action properly lay.

note for £34. 10s., which defendant accepted in satisfaction and discharge of his claim on foot of said note of 1st of July 1864; that defendant, notwithstanding, wrongfully proceeded with said process at the Quarter Sessions held on the 18th of October 1864, and wrongfully obtained a decree against the plaintiff on such process, for £14. 19s. 6d., under which the defendant afterwards took the plaintiff's cattle in execution, and refused to give them up till payment of said sum of £14. 19s. 6d., which plaintiff had to pay to prevent the cattle being sold under said decree.

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The defendant demurred on the following grounds—namely, that the said decree, not having been appealed from, was final and conclusive, and that plaintiff was estopped in this action from alleging contrary to said decree, that the debt thereby declared to be due was not on the pronouncing of the decree due in fact; that the plaint did not show that, by reason of matter subsequent to a decree duly pronounced, it became illegal to execute it, but sought to ground a cause of action solely upon matter prior to the decree, and which should have been made the subject of defence at the hearing of the civil-bill, and relied on an appeal from such decree; that an action did not lie for proceeding in a suit to recover a debt already paid, and that the only remedy in such case was by a defence to such suit; that even if such an action did lie, the plaintiff should allege that the decree was obtained fraudulently, maliciously, and without reasonable or probable cause, &c. &c.

Palles (with whom was *M. Morris*), in support of the demurrer.

The plaintiff cannot go behind the decree. He is estopped from disputing it. He might have appealed if he was dissatisfied. It is not alleged that the decree was recovered fraudulently. He cited *Marriott v. Hampton* (a); *De Medina v. Grove* (b); *Govern v. Rowland* (c); *Phillips v. Naylor* (d).

Macdonogh and *Bostin*, contra, contended that the principle of estoppel did not apply, as the action was founded on a breach of

(a) 2 Sm. L. C. 357.

(b) 10 Law Jour. 152; S. C. in *ibid*, 172.

(c) 7 Ir. Com. Law Rep. 218.

(d) 3 H. & N. 14.

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 does not seek to review the decree.
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Morris, in reply, cited *Moore v. O'Donnell* (a). A plaintiff who does not appear at the hearing below may appeal. This would have been the proper remedy: 14 & 15 *Vic.*, c. 57, s. 79.

MONAHAN, C. J.

We are of opinion that the plaintiff is entitled to maintain this action, which has been brought, not for the breach of an implied contract, but of an express one. An action had been brought in the Civil-bill Court for the recovery of a debt of £34, whereupon the parties entered into a contract which, as pleaded, amounts in substance to this, that the plaintiff should pay to the defendant £20 in cash on account, and should deliver to the defendant the joint and several promissory note of himself and Denis Sullivan, at three months, for the balance, and the sum of ten shillings for costs, and that defendant should stay proceedings in the Civil-bill Court. This is by no means equivalent to saying that the plaintiff ought to recover as for money had and received. The form of this action expressly admits that, by reason of the plaintiff not having defended the action in the Civil-bill Court, he is in point of law estopped from disputing the validity of the decree of that Court. He was bound thereby; but this action is brought not to review the propriety of that judgment, but on foot of the express contract by the defendant not to proceed in that cause; and the plaintiff seeks damages for breach of that contract—not on the money counts, but on the special count upon the contract itself. The cases cited on behalf of the defendant have no application to the question under discussion; for there the parties were aware that the proceedings had been taken. In one of these cases the defendant appeared, and contested the suit; and the plaintiff adversely obtained judgment. The defendant afterwards found a receipt, which showed that if he had been able to adduce the evidence at the trial of the action, the plaintiff must have failed; but the Court decided that

(a) 6 *Ir. Com. Law Rep.* 16.

the question of the existence of such a voucher was not to be re-agitated in a new suit. It has been conceded by the defendant's Counsel that, if judgment be obtained against a party by fraud, and execution be levied, upon subsequent discovery of the fraud the defendant may maintain an action for the fraudulent issuing of the execution. But there is no reason why, if the judgment were obtained in violation of an express contract, the same rule should apply. The case of *Wentworth v. Bullen* (a) was decided on this principle. In this case there was no allegation of fraud, or want of reasonable cause; but it was alleged that, though the plaintiff had by cognovit confessed judgment for £3000, that the defendant undertook, in case of the plaintiff's default, to levy judgment only for £259; whereas execution in fact was issued for £1967; and the plaintiff was arrested thereon. There the action was held to be maintainable, upon the ground that this was a breach of an *express* contract not to levy execution beyond a certain amount, although no action would lie independently of an express contract. Here, an express contract, not to proceed further in the Civil-bill Court, is alleged; and, if the facts are truly stated, the plaintiff ought to recover. Therefore, we must overrule this demurrer.

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(a) 9 B. & C. 840.

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JOHN O'BRIEN, JOHN ROGERS, and THOMAS ROGERS,

v.

Nov. 22, 23,
 25.

PATRICK MURRAY and others.*

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 Dec. 13.

(*Queen's Bench.*)

Mercantile Law Amendment Act.— Chattel real.— F issued a writ of *fi. fa.* against the defendant, and lodged it with the Sheriff on the 3rd of August. Warrant to seize under writ delivered to bailiff, but no seizure proved. On the 6th of August defendant assigned his interest in a term of years to W. & Co., who had no notice of the writ. On the 12th of August the Sheriff sold the term to plaintiffs, and executed a deed of assignment on the 4th of September.

Held, that plaintiffs were not entitled to recover in ejectment.

This was an action of ejectment on the title, to recover possession of the house and premises No. 1 Lower Summer-hill, in the city of Dublin, and was tried before the Hon. Mr. Justice O'BRIEN and a common jury, during the sittings after last Trinity Term.

By deed, dated 25th of May 1854, Mary Turpin and Maria Canavan demised the premises in question to the defendant Patrick Murray, who alone took defence to this action. The lease was for a term of twenty-one years, at an annual rent of £52.

On the 17th of July 1863, one John Forbes recovered against the defendant a judgment, on foot of which a writ of *fi. fa.* issued, and was delivered to the Sheriff on the 3rd of August 1863. The writ was marked for a sum of £54. 13s. 2d.; and a Sheriff's warrant to seize under the writ was delivered to his auctioneer. The plaintiffs did not give any evidence of an actual seizure under the writ.

On the 6th of August 1863 the defendant, in consideration of the sum of £262. 9s. 8d., by deed assigned the residue of his term in the lease to Messrs. Watkins and Co., of Ardee-street, in the city of Dublin, their executors, administrators, and assigns, upon certain trusts, and in pursuance of an equitable agreement of December 1859, to secure a certain sum of money by way of mortgage.

On the 12th of August 1863, the Sheriff's auctioneer sold by public auction the premises, under the writ, for a sum of £30, to the plaintiff Thomas Rogers; and the plaintiffs claimed as assignees of the Sheriff under a deed which bore date on the 4th of September 1863, and recited the writ of *fi. fa.*, a seizure thereunder, and a sale on the 12th of August for the sum of £30.

* Before the Full Court.

The learned Judge before whom the case was tried directed a verdict for the defendant, but reserved to the plaintiffs liberty to move the Court above to change that verdict into one for the plaintiffs, if (*inter alia*) the Court should be of opinion that the assignment from the Sheriff ought to prevail against the assignment to the Messrs. Watkins & Co.

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Accordingly, in this Term (November 5th) the Court granted to the plaintiffs a conditional order, pursuant to the liberty reserved. Against that order cause was now shown by—

Purcell and M. O'Loghlen.

There is not any evidence of a seizure by the Sheriff under the writ lodged with him on the 3rd of August 1863. He must at least visit the premises, and go through the form of seizing: *Atk. Law of Sheriff*, p. 183. That the Sheriff should so visit the premises, and at least go through the form of attempting to get the lease, is required, by the nature and reason of the thing, in order that the debtor may have notice of the execution issued against him, and, by payment of the debt and costs, prevent a sacrifice of his property.—[FITZGERALD, J. Surely, everybody must be taken to have notice of a proceeding against himself?—But not that an execution has issued.—[FITZGERALD, J. There never is an attempt made to actually seize a lease. The usual and uniform practice through the country is, that the execution creditor sends to the Sheriff a notice that the execution debtor has an interest in such and such premises. That is then advertised; and the interest is sold.]—No legal estate vests in a Sheriff's assignee until the assignment to him has been executed by the Sheriff. Therefore, on the 6th of August 1863, the defendant was in a position to make to the Messrs. Watkins a valid legal assignment of his interest under the lease; and the plaintiff, whatever his remedies in a Court of Equity may be, must fail in this action at law, inasmuch as he shows no legal estate in the Sheriff.—[FITZGERALD, J. Has not the Sheriff's conveyance a retroactive effect?—No; though it will doubtless be argued that, from the date of the lodgment of the writ, the premises were bound. But the utmost effect of that binding is to create a *quasi* lien on the

M. T. 1864. chattel real, which may be followed, to the extent of his debt, by the
Queen's Bench execution creditor, into the hands of the Sheriff's vendee: *Playfair*
O'BRIEN v. *Musgrove* (a); *Doe d. Hughes v. Jones* (b); *Samuel v. Duke* (c).
v.
MURRAY.

M. Morris and Beytagh, contra.

In both *Playfair v. Musgrove* and *Doe d. Hughes v. Jones* there was wanting the vital ingredient of an assignment by the Sheriff of the term of years. *O'Connor v. Stephens* (d) was in its circumstances a case precisely analogous to the present: the only difference between them being, that there the purchaser was the defendant, whereas here the defendant is the execution debtor.—[FITZGERALD, J. Does the Court in that case determine that the deed of assignment has a retroactive effect to the date of the lodgment of the writ with the Sheriff?—No.—[FITZGERALD, J. Then the point—if there is anything in it—made here was not made in that case at all?—No; because nobody ever thought of raising the question; but the decision there involved this point. The Sheriff cannot do more than sell, within a reasonable time, the term of years; he need not seize manually: 3 *Bac. Abr.*, tit. *Execution*, let. F, p. 388; *Palmer's case* (e); *Coleman v. Rawlinson* (f).

O'Loghlen, in reply.

The case of *O'Connor v. Stephens* merely decided that the conveyance executed by the debtor did not, by reason of its having been registered before the execution by the Sheriff of his assignment to his vendee, acquire any priority over the Sheriff's assignment. There is no evidence that the defendant's assignees had notice of the previous lodgment of the writ of *fi. fa.* with the Sheriff, and they are therefore unaffected by it: 19 & 20 *Vic.*, c. 97, s. 1.—[FITZGERALD, J. Was that question presented at the trial?—No.—[FITZGERALD, J. The reason why I asked that question is, that if this view had been opened at the trial, there would then have arisen a jury question, namely, whether notice

(a) 14 *Mee. & W.* 239.

(c) 3 *M. & W.* 622.

(e) 4 *Co. Rep.* 74, a.

(b) 9 *M. & W.* 372.

(d) 13 *Ir. Com. Law Rep.* 63.

(f) 1 *F. & F.* 330.

had been given to the Messrs. Watkins & Co.?]—It was not even alleged that the conveyance to them was not *bona fide*, and for value. Their solicitor even was cross-examined, with a view to see whether the deed could be impeached.

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Cur. adv. vult.

On the following day (November 23rd) the Court desired that the case should be re-argued. Accordingly, on November 25th—

M. Morris and Beytagh.

The point on the 19 & 20 *Vic.*, c. 97, s. 1, was not made at the trial. The word "goods" in that section means *personal* goods.—[LEFROY, C. J. As long as ever the writ has been known to the law, and carried out, the Sheriff has sold chattels real.]—But, admitting that the word "goods" includes chattels real, there was clear evidence of such a seizure as it is possible to make of a term of years. A manual seizure of the term of years could not have been made; and the Sheriff cannot enter the house, because the occupier would turn him out as a trespasser. The only direct authority on the point is a strong *Nisi Prius* decision—*Coleman v. Rawlinson* (a).—[HAYES, J. Have you referred to *Balls v. Thick* (b), where Lord Denman said:—"Any act done by a person having "authority, which distinctly intimates to the party that he intends "to execute the writ, is sufficient to constitute a seizure"? I do not see why that sense should not here, as in every other case, be given to the word; and I do not see why the Sheriff may not convey that information by other means than actual seizure.]—The assignment from the Sheriff at all events recites a seizure. It lay on the defendant to prove that his assignment to the Messrs. Watkins & Co. had been made before seizure. The intention of the statute was to protect only goods which can be manually seized.—[FITZGERALD, J. The statute, by making actual seizure the test, seems to indicate a change of the possession of the goods, which puts the public on their guard.]—But there cannot be an actual

(a) 1 F. & F. 330.
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(b) 9 Jur. 304.
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M. T. 1864. seizure of a term of years; for I believe it is settled law that the Sheriff cannot enter on the premises.—[LEFROY, C. J. He would be a trespasser.]
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Purcell and M. O'Loghlen, contra.

The question is, whether the defendant's assignment passed the term of years to Watkins & Co.? It passed the property unquestionably; for it then was in the defendant. If he had paid the amount of the execution, a reconveyance to him from the Sheriff after the payment and a seizure, would not have been requisite; and nothing has since occurred to divest it out of Watkins & Co. The statute makes their title indefeasible, because the transaction took place *bona fide*, and without notice.—[FITZGERALD, J. There are two persons, namely the assignee and his attorney, notice to either of whom would defeat the assignment. The evidence is, that the attorney of the defendant's assignees had no notice; but it is quite possible that the attorney may not have had any notice of the transaction, and yet it may have been quite well known to his client.]—The case of *Coleman v. Rawlinson* (a) simply decides that the assignment from the Sheriff presumes a seizure, in the absence of evidence to the contrary. The Sheriff, if he went to the premises to seize, would not be trespasser: *Playfair v. Musgrove* (b).—[FITZGERALD, J. There is no doubt that the Sheriff can seize a lease; but that is a very different thing from seizing a term of years.]—But it is competent for him, and his duty, to go and try for it.—[FITZGERALD, J. In *Playfair v. Musgrove* the Sheriff was justified in entering to take the deed, which he could manually seize. But it is decided that the Sheriff cannot enter and put the purchaser into possession: he has a right to sell, but not to enter. The entry is distinctly laid down in *Playfair v. Musgrove*.—[FITZGERALD, J. The Sheriff may enter, and remain a reasonable time to execute the writ on any goods that can be seized. If there are no goods, he is a trespasser.]

Cur. adv. vult.

(a) 1 F. & F. 330.

(b) 14 M. & W. 246.

LEFROY, C. J.

In this case the only point we decide is that the plaintiff is not entitled to have a verdict entered for him pursuant to leave reserved.

O'BRIEN, J., concurred.

HAYES, J.

This was an action of ejectment on the title, brought by the purchaser from the Sheriff, of a term of years sold by him under a *feri facias*. The defendant is the lessee under the lease of 25th of May 1854, the interest of which was sold, being the residue of a term for twenty-one years. The facts proved at the trial, as set forth in their chronological order, appeared to be as follows:— On the 3rd of August 1863 a *fi. fa.* was lodged with the Sheriff, at the suit of one Forbes against the defendant Murray, to levy £54. 13s. 2d. On the 6th of August Murray conveyed his leasehold interest to Watkins, to hold same until he should, by receipt of the rents, be paid a sum then due to him from Murray, and afterwards in trust absolutely for one Franklin, another creditor of Murray. On the 7th of August this conveyance was duly registered. On the 12th of August the Sheriff sold Murray's interest in the premises to the plaintiff for a sum of £30. And on the 4th of September the deed of assignment to the plaintiff was duly executed by the Sheriff.

The Under-Sheriff proved that he had made out his warrant to Dillon, a bailiff; but that he had not himself made any seizure of the term; and Dillon proved that he had only seized the moveable goods, but not the term of years. It did not appear that any notice of the lodgment of the writ had been given prior to the sale on the 12th of August, either to Watkins, or Franklin, or to Murray.

A verdict was found for the defendant, and liberty was reserved to the plaintiff to move to have a verdict entered for him in case the Court should think him entitled thereto.

In my opinion the plaintiff is not entitled, upon the facts proved, to have a verdict entered for him.

The object of the 19 & 20 Vic., c. 97, s. 1, is to protect the

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dealings which a person may have in respect of the goods of another, if such dealing shall be *bona fide*, and without any notice of any writ against such goods being lodged with, and then remaining unexecuted in the Sheriff's hands. The Statute of Frauds had enacted that the property in the goods of a defendant in an execution should be bound (not altered) from the time of the lodgment of the writ with the Sheriff; so that any goods disposed of by the party after such lodgment in the ordinary course of his business and not in market or at night, might be followed by the Sheriff, and seized and sold by him under the writ, though they might, in the interval, have been disposed of by the owner, without notice of the writ, and even for the *bona fide* purpose of paying the very judgment debt on which the writ was grounded. It was to remedy this and the like hardships that the clause in the Mercantile Law Amendment Act was passed. That Act is *in pari materia* then with the Statute of Frauds; and I think we must give the same construction to the word "goods" in both Acts—viz., that it was intended in both to comprehend every species of goods which could be made the subject of the writ of *feri facias*, as well terms of years as moveable goods.

But it has been said that the Mercantile Law Amendment Act speaks of the "actual seizure" of the goods; and that a term of years is not capable of actual seizure by the Sheriff, as he may seize personal goods, and therefore the statute cannot extend to a term of years. To that I answer, that this is a remedial law; and, according to the well-established rule, this case being within the mischief intended to be provided against, should, if possible, be held to be within the words of the statute. But I see no difficulty in giving to the words "actual seizure" such an interpretation as will make them applicable to the case of a term of years. To constitute a seizure it is by no means necessary that manual possession should be taken of the several articles. In *Cole v. Davies* (a) it has been held, that "a seizure of part of the goods in a house, by virtue of a *feri facias*, in the name of the whole, is a good seizure of all." So also in *Blades v. Arundell*, as reported to us

(a) 1 Lord Ray. 724.

by Baron Garron (a), Lord Ellenborough speaks of the expense and purpose of seizure as the apprizing others that there is an adverse possession; and in recent times it has been well laid down by Lord Denman, in *Balls v. Thick* (b)—“Any act done by a “person having authority, which distinctly intimates to the party “that he intends to execute the writ, is sufficient to constitute a “seizure.” According to these authorities, it would appear to me that if the Sheriff, having received his writ on the 3rd of August, had, between that day and the 6th of August, repaired to the leasehold premises, which were then in Murray’s possession, and announced to him, or to any person then found on the premises, that they were to be sold under the writ, he would have done enough to constitute an “actual seizure” within the meaning of the Mercantile Law Amendment Act, though he could not have actually dispossessed the party of the premises. That act would have been a sufficient taking of the premises *in custodia legis* to have prevented the defendant’s subsequently dealing with them, provided the Sheriff proceeded in due course of law to make them available under the writ. But as this, or anything equivalent to it, had not been done when the deed to Watkins was executed, I think that the subsequent sale by the Sheriff did not affect the legal estate, which by that deed was vested in Watkins.

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It is true that Watkins is the person to whom relief was intended to have been given by the Mercantile Law Amendment Act; but still, if the construction of the Act be to show that he, and not the plaintiff, had the legal estate when the ejectment was brought, it is quite open to the defendant to avail himself of that defence: *Doe d. Warren v. Horn* (c).

FITZGERALD, J.

I concur with the rest of the Court, that the plaintiff is not entitled to have the verdict entered for him pursuant to the leave reserved, as he has failed upon the point reserved. But it seems to me that the real question in controversy between the parties has

(a) 8 Price, 99.

(b) 9 Jur. 304.

(c) 3 M. & W. 333.

M. V. 1864. not been decided, and that the case should therefore be sent to a
Queen's Bench. new trial. The moment the writ of *fi. fa.* is delivered to the
 O'BRIEN Sheriff, it binds the defendant's property in chattels real; and,
 v. when the Sheriff has by sale and assignment executed the writ, it
 MURRAY. takes effect from the lodgment of the writ, over-riding all inter-
 mediate dealings by the defendant unless they come within the
 protection of the Mercantile Law Amendment Act. There is a
 doubt whether the 19 & 20 *Vic.*, c. 97, s. 1, is applicable to any
 goods other than those moveables which are in the ordinary sense
 capable of actual seizure. That point was, however, given up
 during the argument; and I must assume that that section applies
 to this case, and that the Messrs. Watkins (if their deed is within
 its provisions) are entitled to the protection thereby given. But at
 the trial the point never was submitted to the Judge or jury; and
 when the case came on for discussion in this Court, the senior
 Counsel for the defendant showed cause; the Counsel for the
 plaintiff were heard; and it was not until, I think, the last sentence
 of Mr. O'Loghlen's reply that this Act was first referred to. The
 Act relates to *trade and commerce*, and derogates from the effect of
 the writ under the prior state of the law. It classes together writs
 of execution and of attachment against goods, and protects title
 acquired before "actual seizure" or attachment of the goods,
 provided the transaction was *bona fide, for value*, and *without*
notice. The onus of proving these propositions lay on the party
 claiming the protection of the statute. It does not lie on the
 plaintiff to show that the defendant had notice; but he who claims
 the privilege and benefit of the Act should satisfy the jury that he
 had not notice. That was one of the questions to be submitted to
 the jury—a question to which evidence might have been applied on
 both sides.

The true point was not made at the trial; the proper questions of
 fact were not submitted to the jury; and I think that a new trial
 should be granted, though possibly no great injustice is done by
 leaving the verdict as it is.

T. T. 1864.

Eschequer.

M'ELVENEY v. CONNELLAN.*

*(Eschequer.)**May 26.*

THIS was an action for libel, and came before the Court upon a motion by the plaintiff, under the 64th section of the Common Law Procedure Act 1853, for an order to compel the defendant to furnish a certified copy of all minutes and notes in his power, possession or procurement, of the evidence of the witnesses examined before the defendant (one of the Inspectors-General of Prisons in Ireland), at an investigation held by the defendant, at the Marshalsea of the Four-courts, Dublin; and of so much of the defendant's report as referred to the investigation mentioned in the defences to the action, or to the conduct of the plaintiff as hatchman in the Marshalsea.

The action was brought by the plaintiff, a hatchman in the Marshalsea, against James Corry Connellan, an Inspector-General of Prisons, for a libel contained in a report made by the defendant to the Lord Lieutenant. The summons and plaint complained "for that, before and at the time of the committing of the grievance hereinafter complained of, the plaintiff was a hatchman and door-keeper in the Marshalsea of the city of Dublin, and thereby gained and earned considerable emoluments and salary for discharging the duties of such situation; and whilst plaintiff was so engaged and employed, the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his said employment, the following false and libellous words, that is to say, 'I find that John M'Elveney'—(meaning

Reports made in the discharge of the duties of their respective offices, by Government officials, to the Crown, or its representatives, are state documents, and their production in Court cannot be enforced. A report made by an Inspector-General of Prisons, Ireland, under the 59th section of the 7 G. 4, c. 74, to the Lord Lieutenant, is a state document, and privileged, as its production would be injurious to the public interest.

Therefore, in an action of libel, brought by an officer of the Marshalsea of the Four-courts, upon his dismissal, against the Inspector-General, who had held an investigation into

the discipline of that prison, and had made a report thereon to the Lord Lieutenant, the inspection and production of the report, under the 64th section of the Common Law Procedure Act 1853 and the 55th section of the Common Law Procedure Act 1856, was refused. At the trial of the action the plaintiff was nonsuited, and the cause shown against the conditional order for a new trial was allowed.

* *Coram* PIGOT, C. B., FITZGERALD and DEASY, BB.

T. T. 1864. *Exchequer.* “thereby the plaintiff)—‘has been guilty of aiding, assisting, and
 M’ELVENEY “‘assenting in a fraudulent transaction and corrupt bargain with
 v. “‘Dillon, by consenting to subscribe part of the hush-money, and
 CONNELLAN. “‘for giving part of the hush-money to prevent and keep back the
 “‘witnesses’—(meaning thereby that plaintiff had been guilty of
 “giving money to keep back evidence against himself on a certain
 “inquiry which had been theretofore held concerning alleged
 “misconduct and violation of duty, as such hatchman and door-
 “keeper, by the said plaintiff),—by reason of which false and
 “malicious libel the plaintiff was dismissed from his employment
 “as such hatchman as aforesaid, and otherwise greatly injured in
 “his character and reputation, to the plaintiff’s damage of £300.
 “And the plaintiff further complains, that whilst so employed, as
 “in the first count mentioned, the defendant falsely and maliciously
 “wrote and published of and concerning plaintiff, and of and
 “concerning him in his said employment as hatchman, the fol-
 “lowing false and defamatory words, that is to say, ‘If those
 “‘hatchmen, namely, John Skelton, John Armstrong, and John
 “‘M’Elveney’ (meaning thereby the plaintiff)—‘are not removed,
 “‘it will be impossible to carry out the discipline of the prison’—
 “(meaning thereby that by the misconduct of the plaintiff, and
 “violation of prison rules, that plaintiff was an unfit and improper
 “person to be continued in said employ of hatchman); and by reason
 “of said libel the plaintiff was dismissed from his employment,
 “and otherwise greatly injured in his character and reputation, to
 “the plaintiff’s damage of £300. And plaintiff prays judgment
 “against the said defendant, to recover the said several sums of
 “£300 and £300, making together the sum of £600, and his costs
 “of suit.”

To the above plaint the following defence was filed:—“The said
 “defendant appears, and takes defence to the action of the plaintiff;
 “and says as to each of said counts, distributively, that he did not
 “publish in manner and form therein respectively alleged. And
 “for a further defence to the said first count, the defendant says
 “that, before and at the time of the publication in said count
 “alleged, the plaintiff was a hatchman in the Four-courts Mar-

"Marshalsea Prison in Dublin; and by virtue of the statutable enact-
 "ments in that behalf, removable from his position as such hatch-
 "man, at the will and pleasure of the Lord Lieutenant of Ireland;
 "and says that the defendant was at said time one of the Inspectors-
 "General of Prisons in Ireland; and that it was the duty of the
 "defendant, as such Inspector-General, by virtue of the statutable
 "enactments in that behalf, as often as he should see fit, to visit,
 "among others, the Four-courts Marshalsea Prison, and to examine
 "concerning the due performance of the rules and regulations
 "prescribed, and required to be observed therein respectively; and
 "also concerning all matters connected with the discipline or
 "regularity thereof respectively, and to examine on oath all persons
 "concerned therein; and also all other persons whom he should
 "think proper so to examine touching any matters concerning the
 "said Four-courts Marshalsea Prison; and it was also the de-
 "fendant's duty to report thereupon to the said Lord Lieutenant.
 "And the defendant says that before said publication, defendant, in
 "discharge of his duty as such Inspector-General of Prisons, duly
 "held an investigation in the said Four-courts Marshalsea Prison,
 "concerning certain matters connected with the discipline and
 "regularity thereof, and on the said investigation examined on oath
 "certain witnesses, and among others the plaintiff, Eliza Connolly,
 "John Armstrong, William Kelly, Laurence Dillon, and John
 "Skelton; and that on the said investigation, the said witnesses
 "gave evidence on oath, which the defendant believed to be true,
 "and which satisfied the defendant, as such Inspector-General, that
 "the plaintiff aided and assisted, and assented in a fraudulent
 "transaction and corrupt bargain with Dillon in said count named,
 "by consenting to subscribe part of the hush-money, and for giving
 "part of the hush-money to prevent and keep back the witnesses;
 "and that the plaintiff had been guilty of giving money to keep
 "back evidence against himself, on the inquiry in said count in
 "this behalf mentioned. And the defendant says that, after the
 "termination of the said investigation, he, in further discharge of
 "his duty as such Inspector-General of Prisons, wrote a report of
 "such investigation, and the evidence taken thereat, to the Lord

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T. T. 1864. "Lieutenant; and in the said report wrote and published the words
Exchequer.
 M'ELVENY "in the said first count mentioned, and in the sense thereby
 v. "imputed, which is the publication by said first count complained
 CONNELLAN. "of; and the defendant says that he wrote and published the said
 "report, and the said words contained therein upon the occasion
 "and under the circumstances aforesaid, and solely in performance
 "of his duty as Inspector-General of Prisons; and that he wrote
 "and published same in good faith and without malice, and be-
 "lieving the said words to be true in substance and in fact. And
 "for a further defence to the second count, the defendant says that
 "the plaintiff, being such hatchman, and the defendant such In-
 "spector-General, as in the last defence mentioned, the defendant,
 "in the discharge of his duty as such Inspector-General, held the
 "investigation and examined the witnesses in the said defence
 "mentioned; and that on the second investigation the said wit-
 "nesses gave evidence on oath, which the defendant believed to be
 "true, and which satisfied the defendant, as such Inspector-General,
 "that if the hatchmen in the said second count mentioned were not
 "removed, it would be impossible to carry out the discipline of the
 "prison; and that, by the misconduct of the plaintiff and violation
 "of the prison rules, the plaintiff was an unfit and improper person
 "to be continued in said employ of hatchman; and the defendant
 "says that, after the termination of the said investigation, he, in
 "further discharge of his duty as such Inspector-General of Prisons,
 "wrote a report of the said investigation, and the evidence thereat,
 "to the Lord Lieutenant; and in the said report wrote and pub-
 "lished the words in the said second count mentioned, and in the
 "sense thereby imputed, which is the publication by said second
 "count complained of; and the defendant says that he wrote and
 "published the said report and the said words contained therein
 "upon the occasion and under the circumstances aforesaid, and
 "solely in performance of his duty as Inspector-General of Prisons,
 "and that he wrote and published the same in good faith and
 "without malice, and believing the said words to be true in sub-
 "stance and in fact, and therefore he defends the action."

On the 9th of May 1864 the plaintiff made the following affi-

davits in support of this motion:—"That, in the month of May T. T. 1864.
 "1858, deponent was appointed to a situation in the Four-courts *Eschequer.*
 "Marshalsea Prison in the city of Dublin; and was afterwards, in M'ELVENY
 "due course of advancement, appointed to the situation of hatch- v.
 "man in the said prison, and continued duly discharging the duties CONNELLAN.
 "of the said employment until the 9th of June 1863, when he was
 "summarily dismissed therefrom in consequence solely, as deponent
 "verily believes, of a certain report in writing, made by the
 "defendant as Inspector-General of Prisons, and by him forwarded
 "to his Excellency the Lord Lieutenant; and deponent was dis-
 "missed without a day's notice, and without being apprised of the
 "grounds of such dismissal, and without any opportunity given of
 "explaining as to any imputation against him. Saith, deponent is
 "not conscious of ever having committed any breach or default of
 "his duties as such hatchman, or done any other act to justify or
 "afford reasonable cause for such dismissal, or for the imputations
 "against him which are complained of in this article. Deponent
 "saith that the said report of the defendant was made in or about
 "the month of June 1863, and contained, as deponent verily
 "believes, the words and statements in the summons and plaint
 "alleged as defamatory against deponent; and this deponent has
 "not any copy of the said report, but he verily *believes that the*
 "*defendant has now in his power or possession a copy* of the said
 "report, or could, upon application to the proper authorities, pro-
 "cure the said report or a copy thereof; and deponent believes a
 "disclosure of the contents of said report, so far as appertains to
 "the conduct of deponent, and other persons employed as hatchmen,
 "at the same time at said prison, and such part thereof deponent
 "intends to rely upon at the trial, would be most material and
 "necessary for enabling deponent to adequately prepare for trial;
 "and in order to have ample justice done between the parties,
 "saith that the defendant, in his special defences to the two several
 "counts of the summons and plaint, has pleaded to the effect of
 "justifying the said statements so made in his report as made in
 "discharge of his duties as Inspector-General of Prisons, and has
 "alleged that he published the words in good faith, and without

T. T. 1864. "malice, and believing the words to be true in substance and fact ;
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M'ELVENY "and states that he wrote a report to the Lord Lieutenant, of a
v. "certain investigation, and of the evidence taken thereat, and in the
CONNELLAN. "said report wrote and published the words in question. Saith
"that the defendant in his said several defences states, that upon
"the said investigation he examined on oath six witnesses, whom
"he names ; and that they gave evidence on oath, which the de-
"fendant believes to be true, and which satisfied the defendant,
"as such Inspector-General, that deponent had been guilty of the
"matter charged against him by the said report ; but the defendant
"does not otherwise set forth or state what were the grounds, or
"what was the precise evidence so given, which did so satisfy him
"the defendant. And deponent positively saith, that deponent was
"present at the giving of part of the evidence referred to in said
"defence ; and while deponent was so present, deponent saw that
"the evidence was taken down in writing ; and deponent believes
"that the entire of the said evidence of said six witnesses was in
"like manner taken down in writing at said investigation ; and the
"said written evidence is now in the power or possession of the
"defendant ; and deponent believes that the said written evidence
"of the said witnesses, together with the said report, is preserved
"and is recorded in a certain book in the Castle of Dublin, to
"which defendant has access. And deponent verily believes that
"the said written evidence, if produced, would sustain deponent's
"case upon the merits in this action ; and would show that any
"charge or imputation made against deponent at said investigation,
"arose from a source which rendered it totally unworthy of
"weight and credit, and was made under circumstances well known
"to defendant, at and by means of the said investigation, and
"which could satisfy a jury (as deponent verily believes) that the
"report so made by the defendant, so far as it affected deponent,
"was not made in good faith, but was made without any probable
"cause. Saith that deponent is advised and verily believes he has
"a good and substantial cause of action on the merits in this case ;
"and he verily believes that the true facts and circumstances, as
"disclosed by the evidence in writing hereinbefore mentioned, will

"so establish. And deponent is advised, and believes he cannot
 "safely or fairly proceed to trial in this cause, or be properly
 "prepared in point of evidence, without having previously a
 "disclosure of the contents of said report, and of the written
 "notes of the evidence of said witnesses. Saith that, by the
 "innuendo in the first count of the said plaint it is represented,
 "as if at a time previous to the investigation at which said wit-
 "nesses were examined as aforesaid, an inquiry had been held
 "concerning alleged misconduct and violation of duty by deponent,
 "whereas no inquiry had ever been theretofore held as to any
 "alleged misconduct or violation of duty on the part of deponent;
 "but in fact the inquiry intended to be referred to was an inquiry
 "into certain charges of misconduct alleged against one John
 "Armstrong, who was also a hatchman of said Marshalsea; and
 "on which charges the said Armstrong was acquitted; which
 "inquiry took place in the month of December 1862. Saith that
 "the mistake in said innuendo occurred solely, as deponent believes,
 "from deponent's then attorney having mistaken that part of
 "deponent's case, and having given erroneous instructions in that
 "particular to the Counsel who prepared the said plaint. Saith he
 "is informed, and verily believes that, on the 28th day of April
 "last, a written notice in this cause was served upon the defendant's
 "attorney, requiring within one week certified copies of all minutes
 "and notes in the power, possession, or procurement of the de-
 "fendant, of the evidence of the said witnesses in said defence to
 "the first count mentioned; and also a certified copy of the said
 "report, but to which notice no answer has been received. And
 "deponent refers to the copy of the said notice marked 'A,' and on
 "which deponent has endorsed his name.

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In answer to this affidavit, the defendant filed the following,
 dated the 21st of May 1864:—"That I am the defendant in this
 "action. That the plaintiff in this action was, in the month of
 "May 1863, one of the hatchmen of the Four-courts Marshalsea in
 "the city of Dublin; and, by virtue of the statutable enactments in
 "that behalf, was removable from his situation as hatchman, at the
 "will and pleasure of the Lord Lieutenant. That I am one of the

T. T. 1864. *Exchequer.* "Inspectors-General of Prisons in Ireland, appointed under the
 M'ELVENY v. "Act for Consolidating and Amending the Laws relating to
 CONNELLAN. "Prisons in Ireland; and that, amongst other matters, it is my duty
 "as such Inspector-General, under the provisions of the said Act,
 "to visit, among other prisons the said Four-courts Marshalsea
 "Prison, and to examine concerning the due performance of the
 "rules and regulations prescribed and required to be observed
 "therein; and also all matters connected with the discipline or
 "regularity thereof respectively; and to examine on oath all persons
 "concerned therein, or holding any other office therein; and also
 "all other persons whom I may think proper so to examine,
 "touching any matters concerning the said Four-courts Marshalsea
 "Prison; and it is also my duty under the said Act to report
 "thereupon to the said Lord Lieutenant. That before the writing
 "and publication of the alleged libel complained of in the summons
 "and plaint in this action, certain complaints of misconduct in the
 "said Four-courts Marshalsea having been brought to my know-
 "ledge, I, in discharge of my duty as Inspector-General of Prisons,
 "in the month of May 1863, held an investigation at the said Four-
 "courts Marshalsea Prison, concerning certain matters connected
 "with the discipline and regularity of the said Prison; and at the
 "said investigation I examined upon oath, touching the said matters,
 "several witnesses, and among others the plaintiff, and the several
 "persons named in my second defence to the first count in this action.
 "That after the conclusion of the said investigation, in further per-
 "formance of my duty, I wrote to the Lord Lieutenant a report of
 "the said investigation, and the evidence given on oath thereat,
 "and although the plaint does not in terms refer to said report,
 "defendant has no doubt that the action is for statements supposed
 "or assumed by the plaintiff to be in said report. I say that I
 "wrote the said report, and sent it to the Lord Lieutenant solely in
 "discharge of my duty as Inspector-General, as I was bound to do.
 "And (as to the part of said affidavit in which plaintiff alleges his
 "belief that the said written evidence, if produced, would sustain
 "plaintiff's case upon the merits in this action, and would show
 "that any charge or imputation made against plaintiff at said

"investigation emanated from a source totally unworthy of weight
 "and credit, and was made under circumstances well known to
 "defendant, at and by means of the said investigation, and which
 "could satisfy a jury, as plaintiff verily believes, that the report so
 "made by the defendant, so far as it affected deponent, was not
 "made in good faith, but was made without any probable cause)
 "I say that I framed the said report on the evidence so given on
 "oath by the said witnesses before me upon the said investigation,
 "and upon that evidence alone; which evidence I believed to be
 "true to the extent to which I grounded my report of it; and
 "which evidence, so far as it affected the plaintiff, I believed to be
 "true; and that I was not, at the time of said investigation, or at
 "any time since, nor am I now aware of any circumstance to
 "induce me to doubt said evidence, so far as it affected the plaintiff.
 "And I say I do not believe that, by any of the means, or for any
 "of the reasons by said affidavit of the plaintiff suggested, or by
 "any other means, or at all, a jury could or would ever be satisfied,
 "or suppose that said report, so far as it affected plaintiff, or at
 "all, was not made in good faith, but was made without any
 "probable cause. And I say that there was not only probable
 "cause, according to the best of my judgment and belief, for my
 "making said report, but it would have been a dereliction of my
 "duty if I had not made it as I did. I say I made said report, so
 "far as it affects the plaintiff and otherwise, in all its parts, without
 "malice and in good faith, and with a belief of its truth in sub-
 "stance and in fact, and solely in discharge of my duty as Inspector-
 "General; and that the said report was not published further or
 "otherwise than by so communicating it to the Lord Lieutenant as
 "aforesaid; and I am advised and believe that the plaintiff is not
 "entitled to the discovery he seeks; and that I should, if a trial
 "takes place, rely on the said plea, denying publication, and it is
 "my intention to do so."

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Phillips, in support of the motion.

The relevancy of the defendant's report to the Lord Lieutenant to the plaintiff's case is clear and manifest; therefore the plaintiff is

T. T. 1864. entitled to an inspection, or a copy of it: *Luscombe v. Martin* (a);
Exchequer. *Perrott v. Morris* (b). In *Lynch v. Creagh* (c), which was libel
 M'ELVENEY also, the plaintiff was ordered to furnish the defendant with a copy
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 CONNELLAN. of his own copy of the document sued on, which was then lodged in
 a public office, and inaccessible to the defendant. The plaintiff's
 affidavit discloses facts which bring his case within the 55th section
 of the Common Law Procedure Act 1856. This report is *in the*
power of the defendant; and the objections to its production stated
 in his affidavit should not have any weight with the Court, when
 the report and its contents are of vital importance to the plaintiff's
 case: *The London Gaslight Company v. Chelsea* (d); *Hill v.*
Great Western Railway Company (e); *Steadman v. Arden* (f);
Germaine v. The Athenæum Life Assurance Company (g). The
 50th section of the English Common Law Procedure Act 1854
 (17 & 18 Vic., c. 125) is identical in terms with the 55th section
 of the Irish Common Law Procedure Act 1854.

Serjeant *Armstrong*, *Joshua Clarke*, and *Waters*, contra.

The report of the defendant, as one of the Inspectors-General
 of Prisons in Ireland, is a state paper, and therefore privileged
 and protected against production. The duties which an Inspector-
 General of Prisons is bound to perform are prescribed by the 55th
 and 59th sections of the 7 G. 4, c. 74, which enacts that every
 Inspector-General shall, once at least in every year, visit every
 gaol, and report to the Lord Lieutenant upon, amongst other
 matters, the description of every gaol; and may examine on
 oath all the officers, and all other persons, upon oath, touching
 any matters concerning such gaol. The report made by the de-
 fendant was made under the powers thus given to him, and in
 the discharge of the duties thus imposed upon him; therefore the
 report is an official document laid by a subordinate officer of the
 government to the head of his department. As such it is pri-

(a) 7 Ir. Jur. 24.

(b) 1 Ir. Jur., N. S. 334.

(c) 7 Ir. Jur. 288.

(d) 6 C. B., N. S. 411.

(e) 10 C. B., N. S. 148.

(f) 15 M. & W. 587.

(g) 1 Ir. Jur., N. S. 331.

vileged, since its production would be injurious to the public good: T. T. 1864.
 1 *Taylor on Evidence*, p. 813; *Cooke v. Maxwell* (a); *Home v.*
Bentinck (b); *Black v. Holmes* (c); *Anderson v. Hamilton* (d).
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Phillips, in reply.

The rule protecting state documents from production, upon the application of a person mentioned therein, will be applied only so far as is necessary for the interests of the State and of the public: 1 *Taylor on Evidence*, p. 813. In all the cases cited, where the reports of Governors or of Commissioners were kept back, the ground alleged was, that they were confidential communications: *Wyatt v. Gore* (e). The Clerk of the Privy Council was compelled to state what passed in the Council-chamber: *The Seven Bishops' case* (f); *Lord Strafford's case* (g); *Lee v. Birrell* (h).

PIGOT, C. B.

We cannot yield to this application. Were we to do so, we May 27.
 would be deciding as to what the Judge before whom the case may come at Nisi Prius should do. Nor should our decision upon this motion in any wise influence the Judge at Nisi Prius. The circumstances of the case appear to me identical with those of *Home v. Bentinck*, save that in the latter case the report was made to the Crown; here the report was made for the Crown. We are to decide whether, in the words of the 64th section of the Common Law Procedure Act 1853, the non-production of this report "can be satisfactorily excused." The present motion is based upon the ground that the plaintiff's evidence is contained in that report; therefore the report is evidence common to both parties; for the defendant grounds his plea of privilege upon the report. To grant this motion would be in effect to say that the defendant must

(a) 2 Starkie Rep. 183.

(b) 2 Brod. & Bing. 130.

(c) Fox & Smith, 28.

(d) 2 Brod. & Bing. 156, note.

(e) Holt, 295.

(f) 4 State Trials, 342.

(g) 1 State Trials, 727.

(h) 3 Camp. 337.

T. T. 1864. produce a document which the plaintiff is bound to produce on peril
Exchequer. of the failure of his action. The plaintiff must prove publication of
 M'ELVENY the libel. If he got possession of the report, as one of the public,
 v. after it had left the possession of the Crown, a difficult question
 CONNELLAN. would arise; but it does not appear that the report has ever left the
 proper hands. If the inquiry had not been privileged, and if the
 defendant had notes of the evidence in his possession, the latter
 would not be his evidence solely, and the plaintiff would not be
 disentitled to their production. But it appears that the evidence at
 the investigation was taken down by the defendant, in the presence
 of the plaintiff, and was transcribed and transmitted to the Lord
 Lieutenant. That is what took place in *Home v. Bentinck* (a).
 Therefore, we refuse the motion. If this document were not pri-
 vileged to the defendant, the plaintiff could gain access to it by
 memorial or otherwise.

FITZGERALD, B.

In this case, which is an action of libel, a motion has been made
 by the plaintiff for the production by the defendant of certain docu-
 ments, and, amongst others, of a certain report made by the
 defendant, who is one of the Inspectors-General of Prisons, to the
 Lord Lieutenant.

One of the defences alleges that the libel complained of is con-
 tained in that report, which it alleges to have been made in the *bona*
fide discharge of a public duty, and relies on as a privileged commu-
 nication.

With respect to this particular document, it is said that the
 plaintiff is entitled to its production, under the 64th section of the
 Common Law Procedure Act of 1853, as being a document relied
 on by the defendant in his pleading. On the whole, I am disposed
 to think that it is a document relied on by the defendant in his
 pleading; and the question on the 64th section of the Act appears
 to me therefore to be, whether the defendant can substantially
 excuse its non-production by him.

An affidavit has been filed by the plaintiff stating that the report,

(a) 2 Brod. & Bing. 130.

or a copy of it, is in the possession and power of the defendant, or can, by proper application, be procured by him. The affidavit further states that the report is recorded in a book in Dublin Castle. An affidavit has been filed by the defendant to resist the motion, in which none of these allegations are denied. But on the discussion of the motion, the defendant has insisted that the production of the document cannot be enforced, because it is a communication made to an official person in the discharge of a public duty; and *Home v. Bentinck* (a), and other cases, have been cited to show that it would be the duty of the Court, if such a document was offered in evidence, to prevent its being read.

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It was further insisted, on the part of the defendant, that this report is in fact the document sued on by the plaintiff; that the defendant has put in a defence denying publication, and under which it will be competent for him to insist (from the privileged nature of the document) that it was not published, and to prevent it from being given in evidence or produced at the trial; and it is insisted that now to compel its production would be in effect to deprive the defendant of the benefit of this defence.

I am not prepared to decide now, on the matters before us, that this document is not receivable in evidence. It will be much more proper that that question should be decided at the trial, when either party will have an opportunity to object, and the objection can be put on the record. If it appeared by the pleadings that the libel sued on was one contained in the report in question, and consequently that the plaintiff relied on the document which the plaintiff seeks to obtain from the defendant, I should have thought that the plaintiff could not avail himself of the 64th section of the Act of 1853, without making some special case, because in such case the section would give an equal (I rather think a better) right to the defendant to require its production by the plaintiff; but this does not appear from any pleading of the plaintiff; though from the plaintiff's affidavit it does appear that it is the document on which he relies as containing the libel. It does appear however that the document is one of a public nature; that it is in a public

(a) 2 Brod. & Bing. 130.

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CONNELLAN. depository, and a custody over which the defendant, considered as one of the public only, has no more control than the plaintiff; and it is not clearly shown that it may not be one of which the production would be improper. In effect also the document is the written paper containing the libel of which the plaintiff complains; and under such circumstances I think that the plaintiff should at least show that the document, if producible at all, is not as accessible to him, by application to the proper authorities, as it is to the defendant. I think therefore that the production of the document by the defendant is satisfactorily excused; and, that being so, I cannot concur in any order which will deprive the defendant of the benefit of the existence of a document which, for aught I can see, may be one so completely privileged that it cannot even be produced in evidence.

The other documents sought are the minutes or original notes of the evidence taken by the defendant on the occasion of an inquiry of which the report is stated to contain the result. The production of them is sought under the 56th section of the Common Law Procedure Act of 1856; and the right depends on the law of discovery as administered in Equity.

It seems to me a sufficient answer to this application, that the plaintiff, assuming it to be clear that the documents are in the possession or power of the defendant, has no right to their production, if it appears, as I think it does, that others not parties to the suit, and towards whom the defendant has a duty to discharge in the custody of them, are interested in them.

I am further of opinion that the plaintiff does not show a sufficient interest in the production of the documents, or that they constitute a part of his case. It is conceded that the defence of privileged communication is complete unless malice is shown on the part of the defendant; but the suggestion is, that the documents will show that the inquiry of which they gave an account was not *bona fide* or fairly conducted, and therefore that the plaintiff has a right of action; but that can be no otherwise shown by them than by their not being that which the defendant represents them to be, and which from their nature *prima facie* they must be presumed to be. Now it appears to me, that a party cannot get documents which

prima facie must be deemed to establish the defendant's case, only on the suggestion that they may fail to prove that case, and help his adversary.

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DEASY, B.

The 64th section of the Common Law Procedure Act 1853 was not intended to apply to documents of the character of the report whose production is sought by this motion. This report is a confidential State communication by an officer of the Government to the head of the Government; therefore the case is ruled by *Home v. Bentinck*.

Motion refused with costs.

The action was tried at the Sittings after Hilary Term 1865, before the LORD CHIEF BARON and a special jury. At the trial, the Attorney-General stated that the report made by the defendant was in the possession of his Excellency the Lord Lieutenant, who had desired the Crown Solicitor to attend the trial and bring with him the documents in question. But his Excellency the Lord Lieutenant had directed the Attorney-General to state that in his opinion it would be injurious to the public service to produce the report for inspection. It was agreed that the question should be treated as if his Excellency had appeared in Court, and had stated upon oath that the production of the report would be prejudicial to the public service. Some parol evidence was given to show that the plaintiff's dismissal arose from the contents of the report.

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 May 3.

The LORD CHIEF BARON having ruled that the production of the report could not be enforced, and that there was no evidence to go to the jury upon the plea denying publication, directed a nonsuit.

A conditional order for a new trial, upon the grounds of misdirection, and the rejection of evidence, having been obtained by the plaintiff—

Serjeant *Armstrong*, *Whiteside*, and *Waters*, showed cause.

Butt and *Phillips* appeared for the defendant.

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FROOT, C. B.

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I stated, when this case came before us upon a motion for inspection of documents, that the Judge at Nisi Prius should not be guided by our ruling upon that motion. I thought that something might occur during the progress of the trial to make the report of the defendant evidence. Nothing however did occur. My Brother FITZGERALD has kindly prepared the judgment of the Court.

FITZGERALD, J.

I am anxious to be considered as laying down nothing in this case which does not appear to me both perfectly clear upon authority and necessary for its decision. That certain documents in which the public has an interest are not subject to be produced in a Court of Justice, at the suit of a particular individual, is clear. That the ground of that exclusion is the injury to the public interest which might arise if they were subject to be so produced, is also clear. It is clear that to the class of documents so excluded belong official communications, or communications made to an official person in the discharge of a public duty, whenever it is plain that the duty in compliance with which they have been made requires an unreserved communication in relation to the matter of it, subject to no restriction or qualification other than the discretion of the party making it. In such cases, the effect of their production would be to restrain the freedom of the communications, and render them more cautious, guarded, and reserved, which would be injurious to the public interests, whenever the public duty in compliance with which they are made requires that they should be unreserved. So much appears to me perfectly clear; and beyond this, for the purpose of the present case, it does not seem to me necessary to go.

I do not think it necessary to refer particularly to the authorities, because I have heard nothing laid down in the argument inconsistent with these propositions; but it will be seen that I have made large use of Lord Lyndhurst's judgment in the case of *Smith v. The East India Company* (a). I consider it quite unnecessary, for the

(a) 1 Phil. 50.

purposes of the present case, to consider whether there are or are not official communications which ought to be excluded, simply on the ground that, in the opinion of the official to whom they have been made, or in whose custody they properly are, their production would be injurious to the public interest.

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I proceed to inquire whether the document in question here—a report made by an Inspector-General of Prisons relative to the conduct of an officer of the Marshalsea, to the Lord Lieutenant, under the 59th section of the 7 G. 4, c. 74—be or be not, first, a communication made to an official person in the discharge of a public duty; and secondly, if so, whether that duty did not require an unreserved communication, free from any restraint or limitation other than the discretion of the individual making it. First, then, the 59th section of the Act makes it the duty of the Inspectors-General, or either of them, from time to time (and the particular times are left to their or his discretion), to visit, amongst other gaols, the Marshalsea, and to examine concerning (amongst other things) *all* matters connected with the *expenditure, discipline, and regularity* thereof; and having so done, the Inspectors-General are severally empowered and *required to report thereupon* to the Lord Lieutenant, or other Chief Governor or Governors of Ireland, or to the Court of King's Bench or Judges of Assize, *whenever they shall see occasion so to do*. I think it cannot be doubted that the conduct of an officer of the Marshalsea is a matter concerning the discipline and regularity of that gaol. The report in question followed an inquiry or examination concerning such conduct by the Inspector-General who made it; and it was made to the Lord Lieutenant for the time being. I take it therefore to be quite clear that the report must be considered a communication made to an official person in the discharge of a public duty—a duty imposed by Act of Parliament on a public officer. *Then, secondly*, when does the Legislature provide that this duty shall arise? The answer is, the duty is to arise whenever after an examination made the officer shall, in the exercise of his discretion, *see occasion* to make a report upon the subject of that examination; his duty is not simply to return evidence taken before him (if any), but to report upon the matter examined into

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 CONNELLAN. whenever, in his discretion, the public interest requires that he shall do so ; for this I take to be the plain meaning of the words " whenever they shall see occasion so to do." Now, I cannot conceive how the Legislature could more distinctly show its intention that the communication should be wholly unreserved and unfettered. The Inspector-General is to judge, in the free exercise of his discretion, whether the circumstances require a report ; and, if he come to the conclusion that they do, it is absolutely his duty to report. I cannot doubt but that, if communications of this nature were subject to production in a Court of Justice, at the suit of a particular individual, the free exercise of the discretion on which the duty arises would be seriously interfered with ; and it seems obvious that the considerations of public interest which in the mind of the officer create the duty, must form in nearly every case a part of the communication. It seems to me therefore clear upon authority that the document in question comes within the rule of exclusion to which I have referred. It was said indeed that the Act of Parliament itself shows that the report under the 59th section was not intended to be of a secret or confidential nature, and that it actually contemplates a public use being made of it, and even the particular use of production in a Court of Justice. I do not stop to inquire whether there be not some ambiguity in this use of the words " secret " and " confidential ; " but, for the purpose of this argument, it is said that, by the provisions of the 59th section, the report therein mentioned may be made to the Court of King's Bench, or to the Judges of Assize, as well as to the Lord Lieutenant ; and it is asked whether a Court of Justice or Judges of Assize could be considered the proper depositories of a public confidential communication ? To this I answer, unquestionably not, in my opinion, if the communication be made to the Court of Justice or the Judges, as the foundation of any judgment to be pronounced by them. But I can perfectly understand that the Court or the Judges may, with reference to particular duties imposed upon them by the Act itself, be proper recipients of communications of a nature not subject to production within the rule of law. It is sufficient for me to refer to the 112th section of the Act as to the Court of King's Bench, and

to the 134th section of the Act as to both that Court and the Judges of Assize, as containing particular duties to be performed by them respectively, with reference to which such communications might be of great importance. Whether the selection of a Court of Justice or Judges for the purpose of performing such duties was or was not a wise one, is a question with which we have nothing to do. For the purpose of the same argument it is said that, by the 60th section of the Act, if any Inspector-General shall, in any report required to be made by him, knowingly state anything false, he shall be thenceforth incapable to hold the said office, and shall lose and forfeit the same; and it is asked how is it possible that the guilt which creates this incapacity and avoidance of the office can be established otherwise than by a judicial proceeding in which the report shall be produced? My answer is, I think it is not possible; I know of no mode in which such guilt, involving incapacity and avoidance of office, can be established, but by such judicial proceeding. The Lord Lieutenant may by his order remove the officer if he will; but if he does, it is his order that avoids the office, and not the guilt, though twenty prisoners' private inquires had been made before him or his Attorney-General. But if the Act, for public interests, makes such a proceeding necessary, then, upon the question of production of the report, the conflict is between the public interests, in which case one or other must give way; and the Act, by rendering the proceeding necessary, has itself determined *which* shall give way. But the rule of law on which I rely relates to a conflict between the public interest and the interest of a private individual at whose suit the production of the document is demanded.

On these grounds, I think that my LORD CHIEF BARON at the trial rightly refused to allow the report in question to be produced, and that the cause shown on the part of the defendant ought to be allowed.

DEASY, B., concurred.

Leave to appeal refused.

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May 12, 29.

O'REILLY v RICHARDSON and Another.*

An acceptance in the words "for Richardson and Son, Thomas Popple" is not equivalent, according to the Law Merchant, to the form "per proc. Richardson and Son, Thomas Popple." The former expression does not, like the latter, import a special and limited authority to do a specific act; nor does it put the drawer of a bill, accepted in that form, upon discovery, whether the agent has exceeded his authority.

Acceptance in the form "for Richardson and Son, Thomas Popple," is to be governed by the general rule of law applicable to principal and agent. Therefore the course of dealing by the agent acting for his principal with third parties, is evidence to go

to a jury towards determining the extent of the agent's authority.

It is not necessary to serve notice of motion for liberty to appeal.

THIS was an action by Michael O'Reilly against Thomas and Joseph Richardson, "For that the defendants, on the 15th of January 1864, by their bill of exchange, now over due, directed to the defendants by the style and title of Thomas Richardson & Son, required the defendants to pay to the plaintiff £100, six months after date; and the defendants, by the style and title aforesaid, accepted the said bill, but did not pay the same." Then followed the ordinary money counts. Defences:—a traverse of the acceptance as alleged; a traverse of the money counts, and set-off. Replication to the plea of set-off.

The case was tried before the LORD CHIEF BARON, at the sittings after Michaelmas Term 1864.

The plaintiff, a printer in Dublin, stated that he had had dealings with the defendants, who were booksellers in Dublin and Derby, and resided in the latter, for eighteen years prior to 1863. Popple was the sole manager of the defendants' house in Dublin. The plaintiff had cross accounts with the defendants; during all that time he drew bills of exchange upon the defendants, and they drew upon him. When the defendants drew upon the plaintiff, Popple wrote their name; he did the same when the plaintiff drew upon the defendants. Popple always purported to draw "for Richardson and Son." That was the name over the defendants' shop. The bill, the subject of the action, was dated the 15th of January 1864, and was a renewal of one at six months, dated the 12th of July 1863. The bill and its renewal were accepted as follows:—"Accepted for Thomas Richardson & Son, Thomas Popple." Popple had frequently borrowed small sums of money from the plaintiff, to

* *Coram* PIGOT, C. B., HUGHES and DEASY, BB.

take up bills (as Popple alleged) of Richardson & Son, which were all duly repaid. All the plaintiff's dealings with Richardson & Son were through Popple. Popple told the plaintiff when he passed the bill now sued on, that its proceeds were required to take up a bill of Richardson & Son which was coming due. Popple left the country when the renewal fell due.

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A witness named Mullany stated that he had brought an action against the defendants upon an acceptance in the name of Richardson & Son, by Popple, and had been paid the amount.

Several witnesses, on behalf of the plaintiff, stated that, in the course of their dealings in Ireland with Richardson & Son, Popple had accepted bills "for Richardson & Son." The defendant Thomas Richardson stated that Popple, his agent in Dublin, had authority to sell, to receive money, and to give receipts. He had no authority to accept bills. Defendant never remitted money to Popple, nor had Popple ever applied to him to remit money to meet demands upon the defendants. Popple never had any authority to borrow money. He had authority to give credit, and to take bills. The travellers of the firm used to send bills to Popple to fill up in the names of "Thomas Richardson & Son." Popple never had a written authority to draw bills; but defendant understood that he drew bills "for Thomas Richardson & Son, Thomas Popple." First heard, on the 23rd of February 1863, through the Royal Bank, Ireland, that Popple had accepted bills in the name of the defendants, in consequence of notice that the bill, upon which defendants were afterwards sued by Mullany, and which they paid, was over due.

At the close of the case, Counsel for the defendants called upon his Lordship to direct a verdict for the defendants upon these grounds—viz., that there was no evidence that Popple had, in January 1864, any express or implied authority to accept the bill in question on account of the defendants; and that as the bill purported to be drawn by procuration, the plaintiff had distinct notice that he was dealing with a person having limited authority, and he was bound to ascertain whether the authority extended to the acceptance of that particular bill. The LORD CHIEF BARON refused so to direct the jury; and left it to them to say, whether Popple had

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 RICHARDSON any authority, express or implied, to accept bills for the defendants;
 and whether the defendants, by their acts, permitted him to hold
 himself out to those who dealt with them as a person having
 authority to accept bills in their name.

The jury found for the plaintiff upon all the issues. A conditional order for a new trial, upon the grounds of misdirection and the reception of illegal evidence, having been obtained by the defendants—

Macdonogh, Purcell, and Carton, showed cause.

The general course of dealing between the plaintiff and defendants, and the general course of dealing between the defendants and the public, were rightly left to the jury as matters from which they should judge whether the defendant had allowed Popple to act as their general agent. If they did do so, they are liable, although Popple may have exceeded his authority: *Smith v. Maguire (a)*. The general course of dealing between the public and the defendants was also material for the jury, from whence they might infer a general authority to Popple. The admission by the defendants of their liability upon an acceptance in their name by Popple, is strong evidence confirmatory of a general authority to Popple to accept bills in the name of the defendants: *Llewellyn v. Winkworth (b)*; *Barber v. Gingell (c)*; 1 *Taylor on Evidence* (4th ed.), p. 735.

Butt, James Robinson, and William Duggan, for the plaintiff.

The admission of Popple's authority to accept bills in the name of the defendants, when they allowed judgment to go by default upon one bill accepted "for Richardson & Son, Thomas Popple," applies only to that particular case; that admission is not admissible in evidence in the present case: *Holt v. Myers (d)*. How far an admission before arbitrator is admissible, *Doe d. Lloyd v. Evans (e)*.

The form of the acceptance "for Richardson & Son, Thomas Popple," was equivalent to an acceptance "per procuration," or, as

(a) 3 H. & N. 554.

(b) 13 M. & W. 598.

(c) 3 Esp. 60.

(d) 9 Car. & P. 191.

(e) 3 Car. & P. 219.

it is usually written "per proc.," and therefore the plaintiff had notice that the acceptor had but a limited authority, and that if the agent exceeded his authority, he had no remedy against the principal: *Stagg v. Elliott* (a).

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Parcell, in reply.

The acceptance upon the bill in question is not "per procuration." *Stagg v. Elliott* does not weaken the force of *Smith v. Maguire* (b). The law and the cases relating to the powers and duties of agents towards their principals is summed up in *Smith's Mercantile Law*, 7th ed., pp. 130-132. The submission to a judgment by default of the defendants upon an acceptance in their name by Popple was confirmatory of his authority to accept bills: *Rahey v. Gilbert* (c); *Barber v. Gingell* (d); *Collett v. Lord Keith* (e). The plaintiff had no notice that in 1860 the defendants withdrew from Popple the authority to accept bills.

The LORD CHIEF BARON delivered the judgment of the Court. Having alluded to some unimportant questions raised in the case, he proceeded:—

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 May 12.

It was argued, on the part of the defendant, that the form of the acceptance by which Popple accepted the bill "for Richardson and Son," made it equivalent to an acceptance "by procuration of Richardson & Son," and brought the case within the authority of those cases in which it has been considered that an acceptance in that form shows that the agent is acting under a special authority, and in which it has accordingly been held that the party taking such an acceptance takes it at the risk of failing to recover upon it against the alleged principal, if the authority has not been pursued: *Atwood v. Mannings* (f); *Alexander v. Mackenzie* (g); *Stagg v. Elliott* (h); *Eyre v. M'Dowell* (i).

(a) 12 Com. B., N. S. 373.

(b) 3 H. & N. 554.

(c) 6 H. & N. 536.

(d) 3 Esp. 60.

(e) 4 Esp. 212.

(f) 7 B. & C. 278; S. C., 1 Man. & Ryl. 66.

(g) 4 Com. B. 766; S. C., 13 Jur. 346; 18 Law Jour., N. S., C. P. 94.

(h) 12 C. B., N. S. 373; S. C., 31 Law Jour., C. P. 271.

(i) 14 Ir. Com. Law Rep. 314.

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The rule so laid down applies expressly to acceptances or indorsements "by procuration," or, in the abbreviated form, "per proc."—forms well known in mercantile usage. The rules so applied to those forms "extends"—as Mr. Justice Byles observe in *Stagg v. Elliott (a)*—"all over Europe and America; and this is the way in which it is understood all over the world."

What is meant by the form of acceptance which refers to a "procuration" is clearly explained by *Professor Story* in his book on *Agency*, section 72:—"Where an authority purports to be derived from a written instrument, or the agent expressly signs the contract, or other paper, introduced with the words 'by procuration,' as—if he signs 'by procuration of A B' (his principal), 'C D' (the agent)—in such a case the other party is bound to take notice that there is a written instrument of procuration; and he ought to call for and examine the instrument itself, to see whether it justifies the act of the agent; for, under such circumstances, it is but a reasonable precaution and exercise of prudence; and he is put upon inquiry. And, if from his omission to examine, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the credit of the agent." This passage in *Story on Agency* is cited by Mr. Justice Byles in his judgment in *Stagg v. Elliott (b)*. The case of *Atwood v. Mannings* is cited by *Professor Story* towards the close of the section. I apprehend it was in reference to that import of the terms "by procuration," which *Professor Story* has ascribed to them, namely, that they indicate a written "procuration" or authority, that Mr. Justice Bayley says (c), that a person taking a bill accepted in that form "must take it upon the credit of the party who assumes the authority to accept; and it would be only reasonable prudence to require the production of that authority." The authority cannot be *produced* unless it is in writing.

The principle of those decisions would, I apprehend, necessarily apply to any other form of words which should distinctly import

(a) 12 C. B. 382.

(b) 12 C. B., N. S. 381.

(c) 7 B. & C. 283.

that the agent did the act under a special and limited authority, *E. T. 1865.*
as, by referring expressly to a "power of attorney," or a "letter *Exchequer.*
of instructions," from his principal. In all the decisions which *O'REILLY*
have been cited, the Judges rested their judgments upon the *v. RICHARDSON*
fact that the act of the agent, in accepting "by procuration,"
referred in terms to a special and limited authority; and thus,
by the very act in question, showed to the person who trusted
him that his authority was not general, but restricted and defined.
In *Atwood v. Mannings* (a) the Judges founded their judgments
upon the form of the acceptance "by procuration." In *Alexander*
v. M'Kenzie (b) Mr. Justice Coltman says:—"If this banking
"company had been in the habit of allowing their cashier or
"manager to indorse bills on their behalf, that would have imported
"a general authority; and the public would not have been bound
"to inquire into the circumstances, or the precise extent of such
"authority. They have not, however, done so here; but in every
"instance the indorsement, by the form of it, bears an intimation
"to the public that the manager acts under a special authority;
"and therefore the persons into whose hands the bills might come,
"were bound to see that the authority was properly pursued."
The language of Mr. Justice Maule contains a clear and accurate
exposition of what seems to be indicated by the current of these
authorities; he says:—"According to the evidence given in this
"cause, every bill that was accepted or indorsed by Bleckly, the
"manager, was accepted or indorsed with an express intimation
"that the acceptance or indorsement was done under a special
"and limited authority. The whole course of business proved had
"reference to bills so accepted and indorsed only. The case is
"therefore removed out of that class of cases where the extent
"of the authority is to be inferred from its exercise; and the
"mode of exercising it does not import any limitation of the
"authority." In that case, which was an action against a public
officer of a banking company, sued as such, the question arose
upon an indorsement in this form—"Per proc., Newcastle-upon-
Tyne Joint-stock Banking Company; H. Bleckly, manager." In

(a) 7 B. & Cr. 283, 284, 285.

(b) 6 Com. B. 773.

E. T. 1865. *Grant v. Norway* (a) Lord Chief Justice Jervis distinguishes between evidence of other acceptances with the words "per proc.," and evidence of other acceptances, which were general, in the name of the principal, and "which would be evidence of a general authority to accept in the name of the principal." In *Stagg v. Elliott* (b) Mr. Justice Byles, after referring to the authorities before cited, says:—"The result of the decisions seems to be this, that the way "in which this bill was accepted is the legitimate way of showing "the fact that the acceptor has only a special and limited authority. Further, it is to be observed that the rule depends upon the "law merchant, which extends all over Europe and America; and "this is the way in which it is understood all over the world." It appears, from the reports of *Stagg v. Elliott* (c), that both Lord Chief Justice Erle and Mr. Justice Willes, in the course of the argument upon the case of *Smith v. Maguire* (d) being cited, distinguished between the case in which there was evidence of general authority to accept bills, and the case before them, in which the evidence was only of frequent payments, by the defendant, of other bills accepted by the alleged agent in a similar manner; that is, "per pro. of William Elliott, George Elliott." William Elliott, the defendant in the action, was the alleged principal, and George Elliott was the alleged agent.

Although it was argued strenuously before us that the acceptance by "Thomas Popple, for Richardson & Son," imported the same thing as an acceptance "by procuration of Richardson & Son," and must abide the same rule, yet no authority was cited in support of this alleged analogy; and the reason of the rule, as expounded in the authorities in which it has been applied, appears to me very plainly to negative any such analogy. The words "by procuration" are construed as importing a reference to a special and limited authority. The words "for Richardson & Son" refer to no special or limited authority; they appear to be within the very terms in

(a) 10 Com. B. 688-9.

(b) 12 C. B., N. S. 391-2.

(c) 12 C. B., N. S. 377; S. C., 31 Law Jour., C. P. 261.

(d) 3 H. & N. 564.

which Mr. Justice Maule, in *Alexander v. McKenzie* (a), describes E. T. 1865.
the class of cases which he contrasts with those in which the Exchequer.
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"The case," he says, "is removed out of that class of cases where
 "the extent of the authority is to be inferred from its exercise,
 "and the mode of exercising it does not import any limitation
 "of the authority." The words "for Richardson & Son" do not
 import any limitation of the authority; they signify nothing more
 than that the acceptor acted as the agent of the firm in accepting
 the bill. Being in their very terms indefinite, their primary import
 is that of indicating a general authority to act for the agent's prin-
 cipal. It was conceded in the argument (and the contrary could
 not be contended consistently with the authorities) that the accept-
 ance of the agent, using the name of his principal, and not using his
 own, if followed by recognition of his act, by the payment of his
 acceptance so made, or otherwise, would be evidence of his general
 authority to accept. But the act of accepting in the name of
 another, and of delivering the acceptance so made, is only the
 indication, by such act, of precisely what is expressed by the accept-
 ance in the form of that which was made in the present case.
 When Popple accepted or indorsed, using the name or form of
 "Richardson & Son," without more (as he appears to have done
 on several occasions), bills to persons who knew that his name was
 Popple, and not Richardson, and who dealt with him as the known
 agent of the Richardsons, he announced that he so accepted or
 indorsed for "Richardson & Son," as fully and clearly as he did
 when he accepted or indorsed a bill "for Richardson & Son," sub-
 scribing his own signature to those words. It is true that they to
 whom bills of the former class were afterwards transferred or nego-
 ciated may or may not have known that those bills were accepted in
 the handwriting, not of either of the Richardsons, but of Popple,
 the manager of their house in Dublin. But the drawer of bills
 who received them from Popple, accepted by him in the name
 of Richardson & Son, knowing Popple's signature (as Mr. Mullany,
 for a series of years prior to 1860), or who saw him so accept them

(a) 6 Com. B. 775.

E. T. 1865. (as Mr. Tallon), was as fully aware that Popple accepted "for
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 RICHARDSON across the bill. On this ground, I think the case before us, in
 which the acceptance contained no such words as "by procuration,"
 or any form of words referring to any special or limited authority,
 is not within the rule applied in *Alexander v. M'Kenzie*, and the
 other cases of the same class to which I have referred; and if that
 be so, it must be governed by the general rule of law applicable to
 "principal and agent," and to the liability of the principal for the
 acts of the agent. That rule may be stated in the terms used in
Smith's Mercantile Law, p. 132, 6th ed.—"That, where the autho-
 rity of the agent is to be inferred from the conduct of the principal,
 "the extent of the agent's authority is (as between the principal
 "and third parties) to be measured by the extent of his actual
 "employment:" and, further, that "he who accredits another, by
 "employing him, must abide the effects of that conduct, and will
 "be bound by contracts made with innocent third persons, in
 "the seeming course of that employment, whether the employee
 "intended to authorise them or not." The latter part of this rule
 of law is laid down in different terms, but to the same effect, in
Story on Agency, sec. 127; which was in substance adopted by
 Sir John Romilly, in his elaborate judgment in the recent case of
Pole v. Leash (a), and by Lord Kingsdown, in the same case in
 the House of Lords (b). It is nowhere more clearly expounded
 than by Lord Chief Baron Pollock in his judgment in *Smith v.*
Maguire (c). Although I prefer that our judgment should be rested
 on the ground that the general form of the acceptance in the case
 before us exempts it from the application of the authorities which
 have dealt with acceptances and indorsements "by procuration,"
 yet I wish not to be understood as, acceding to the argument
 that if this were an acceptance "by procuration," the other evi-
 dence in the present case would *not* have warranted a verdict for
 the plaintiff. It is to be remembered that there was ample evidence

(a) 28 Beav. 562.

(b) 9 Jur., N. S. 834.

(c) 3 H. & N. 560.

of large trust reposed by the defendants in Popple; of his having accepted bills in their names for a series of years; of these acceptances having been recorded in the bill-book kept by him in the house in Dublin; of some of these acceptances having been entered in the ledger; of those books being so kept that the senior partner of the defendants' firm, on the occasion of his visits to Dublin, had full means of access to them; of Popple's transmitting weekly accounts of his dealings to the defendants at Derby, and of those acceptances having been paid. Popple residing in Dublin, and the defendants residing in Derby, there was evidence that Popple was employed for a series of years as the general manager of their business in Dublin. Upon the entire of the evidence given at the trial, there were ample grounds for inferring that the conduct of the defendants in their dealings with Popple was such as to induce those with whom they dealt, and even to induce Popple himself, to believe that Popple had authority to accept bills for them. Now, in none of the cases in which the rule as to acts done "by procuration" has been applied to limit the principal's liability to the agent's *actual* authority was there any evidence of general authority to accept bills for the principal. In none was there any evidence of previous recognition of acceptances or indorsements, save of acceptances or indorsements bearing on the face of them a reference to a procuration—that is, to a special authority. It *Atwood v. Mannings* there was proof of two previous acceptances which had been paid, each purporting to be accepted by the agent "by procuration" of the principal. In *Alexander v. Mackenzie* (which dealt with an indorsement by procuration) the judgment of the Court, as expressed by Mr. Justice Coltman and Mr. Justice Maule, was rested on the fact that, according to the evidence, every acceptance or indorsement of the agent here (by the terms "per proc."), was an intimation to the public that the agent acted under a limited authority; and no evidence of general authority had been given at the trial. In *Snagg v. Elliott* all the acceptances, the payment of which by the defendant was relied on as evidence of the principal's recognition of the alleged agent's authority to accept, were made in terms "per proc."

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E. T. 1865. of the alleged principal. What those cases decided therefore was, *Eschequer*,
 O'BILLY v. RICHARDSON that where a defendant is sued upon an acceptance or an indorsement made "by procuration," and alleged to have been so made by his agent, and there is no evidence of agency, save that of the defendant's recognition of his liability on bills previously accepted or indorsed by the agent "per proc." or "by procuration" of the defendant, there the defendant shall not be bound, unless the acceptance was made by the agent, acting within the scope of his actual authority. To that extent the principle of those decisions is of great importance, and ought, in my opinion, to be upheld, as a principle founded on reason and justice, as well as on general commercial usage. The reference to a "procuration" indicates a special authority; and is understood so to do, as Mr. Justice Byles observes, in commercial circles all over the world. The recognition, by the principal, of such an acceptance of *one* bill, is only an admission that *such* bill was accepted by the agent within the scope of his special authority. Each successive admission, so limited, made in reference to each of several successive bills similarly accepted, is only a recognition of the same limited authority (unless something more appears), and leaves the person who takes such a bill, without further inquiry, exposed to the same risk—namely, that the bill is not binding on the alleged principal, because it was not accepted within the authority previously recognised: that is, within the limited and special authority which was referred to in the acceptance of the last bill, as well as in that of the first of the series.

But these cases do not decide, that where there is other evidence of general authority to accept, there, although the acceptance, or although several acceptances, were expressed to be made "by procuration," the principal may not be bound by the result of the entire evidence taken together and as a whole. Neither do they decide that he will not be bound, if proof be given by other evidence, that he has so dealt towards his agent and towards those with whom both have been dealing, as to hold the agent out to the world as having a general authority to accept bills on his behalf. Under such circumstances the principal *may* be precluded from

denying that there was a procuration or authority co-extensive with the authority which he has made the public believe to exist; and that he *will* be so bound is a proposition which has not been negatived by any decision. In *Prescott v. Flinn* (a) the action was by indorsee against indorser of a bill of exchange, alleged to have been indorsed to the plaintiff by the agent of the defendants. The evidence of authority consisted, first, of proof that the defendants had introduced the agent to their bankers as their confidential clerk, and one to whom the bankers were to pay the same attention as to the defendants themselves; and, secondly, of proof of a variety of instances in which the clerk had drawn checks, and some in which he had indorsed bills, expressing, in each of the checks and in each of the indorsements, that he did the act "by procuration" of the defendants. Both classes of evidence were submitted to the jury; and it was held that the recognition of the checks, and of the indorsements, was properly submitted to the jury as evidence tending (with, of course, the other testimony) to establish the clerk's authority to bind the defendants by the indorsement. In *Smith v. Maguire* (b) the action was upon a charter-party, signed, at Limerick, by the defendant's brother, "by procuration" of the defendant, who resided in London, but who carried on business as a corn merchant at Limerick. There was evidence that the brother had acted in Limerick as the general agent of the defendant; and there was also evidence, that the brother had previously signed charter-parties for the defendant, in the same form, however, "by procuration" of the defendant. Baron Martin asked the jury whether the brother was permitted and allowed by the defendant to act as his general agent at Limerick; and told them that, if so, it was not material what the private arrangement between them was. The verdict was for the plaintiff; and the Court upheld the ruling of the learned Judge. It is worthy of remark, that the Judges of the Court of Exchequer who decided *Smith v. Maguire* recognised the decision made in *Alexander v. Mackenzie*; and that the Judges of the Court of Common Pleas who determined *Scrags v. Elliott*

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(a) 9 Bing. 19., S. C. 2 Moore & Scott, 18.

(b) 3 H. & N. 554.

E. T. 1865. recognised the decision made in *Smith v. Maguire*, apparently on the ground that, in that case there *was* evidence of general authority. Mr. Justice Keating said, at the close of the judgment of the Court, "Our judgment should not be understood as at all "interfering with the decision of the Court of Exchequer in *Smith v. Maguire*, which does not necessarily conflict with the decisions "here."

I prefer, however, as I have said, that our judgment (as to this part of the case) should be rested on the ground that the acceptance in the case before us was neither in form nor in substance an acceptance "by procuration," or an acceptance indicating a special or limited authority; and to abstain from pronouncing an opinion as to how the case might have been dealt with if, in terms, the acceptance had been "by procuration" of the defendants.

I have dealt with this last topic of the defendants' argument at some length, not because I entertain any doubt upon it, nor merely because the defendants' Counsel pressed it rather earnestly on the Court, but because on a commercial question it is very desirable that not only the decision of the Court, but also the grounds of it, should be distinctly stated and clearly understood.

May 29. *James Robinson*, on behalf of the defendants, applied for leave to appeal.

Purcell, and *Carton*, contra.

Notice of the motion should have been served.

PIGOT, C. B.

Certainly not; I never heard of such a thing. Let the case stand for a few days.

June 2. *Butt*, and *Duggan*, for the defendants.

Purcell, and *Carton*, for the plaintiff.

PIGOT, C. B.

The Court should carefully consider the nature of each case before they allow an appeal. This is not a case for an appeal. Popple was held out by the defendant to the public for eighteen

years, and the entire management of his affairs was intrusted to him, and the debts and contracts entered into by him ought to be paid by the defendants.

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Appeal refused. No costs of the motion. RICHARDSON

MATHEWS

v.

THE DUBLIN & DROGHEDA RAILWAY COMPANY.*

M. T. 1865.

Nov. 11, 21.

THIS was an action against the defendants as carriers of cattle. The first count charged a breach of the defendants' contract to provide waggons for the plaintiff's cattle at a reasonable time before the starting of the train by which the defendants had contracted to convey the cattle. Special damages—That "the plaintiff intended to offer said cattle for sale in Huntingdon, on Saturday the 19th day of November 1864; and, by reason of the premises, the plaintiff was unable to have the said cattle in Huntingdon upon said day in time to offer the same for sale, and lost the sale thereof; and said cattle, by reason of the premises, were detained upon their journey from Dublin to Huntingdon longer than they would have been, had the defendants delivered any waggon, or for the delivery of cattle or live stock at any particular time, or for any particular market."

Held, that such stipulation did not qualify the implied contract to deliver within a reasonable time, but only prevented the question of reasonable time from being affected by the express wish of the consignor to have his cattle delivered at a particular time, or for a particular market.

The sailing bills of a Steam-packet Company, whose vessels formed a link in a through-booking system, contained a condition as follows:—"Cattle to be forwarded by this route are received, subject to this express stipulation, that if it shall be found, on the arrival of the cattle in Dublin, that there is not room for the conveyance of the cattle by the next ordinary vessel of the London and North Western Railway Company proceeding to Holyhead, the Company shall not be bound to forward the cattle until the sailing of the ordinary vessel next following that of the vessel in which there shall not be room for the cattle." Part of a contract to carry cattle was in writing, viz., the above sailing bill, part by parol.

Held, that it was a question for the jury whether, upon the evidence, the contract between the parties had been made subject to the above stipulation or not.

* *Coram* PIGOT, C. B., FITZGERALD and DEASY, BB.

M. T. 1865. *Exchequer.* “than, but for the aforesaid breaches of contract, they would have
 MATHEWS v. “been; and were, by reason of the premises, not only bruised and
 DUBLIN AND “injured, but also became and were distempered and affected with
 DROGHEDA “disease, and maimed, and rendered lame; and the plaintiff not
 RAILWAY. “only lost large profits which he would otherwise have made by
 “the sale thereof, but also was obliged to make, and did make,
 “divers journeys; and incurred expense and loss of time in en-
 “deavouring to cure and heal said cattle, and in bringing them
 “to divers places for sale; and in finding, keeping, and curing
 “the same; and was ultimately obliged to sell the same for a less
 “price than, but for the breaches of contract aforesaid, he could
 “and would have sold them.”

The second count was as follows:—“That defendants were
 “carriers of cattle from Kells in Ireland to Huntingdon in England,
 “by the route and in manner following—that is to say, from Kells
 “to Dublin by railway, thence to Holyhead by the steamer of a
 “line known as ‘The London and North Western line,’ and from
 “Holyhead to Huntingdon by railway; and in consideration that
 “the plaintiff would deliver to the defendants, as such carriers,
 “being, to wit, thirty-nine head of cattle, to be carried by them,
 “by the route and manner aforesaid, from Kells to Huntingdon,
 “and at Huntingdon aforesaid to be delivered for the plaintiff,
 “defendants promised plaintiff to forward said cattle from Dublin
 “to Holyhead (being part of said journey from Kells to Hun-
 “tingdon) by a certain steamer, which was advertised to sail from
 “the North-wall, Dublin, for Holyhead, at or about the hour of
 “ten o’clock in the evening of the 17th day of November 1864;
 “and the plaintiff delivered to the defendants, and the defendants
 “received and had from the plaintiff the aforesaid cattle, for the
 “purpose and on the terms aforesaid; and all conditions were
 “performed, things happened, and times elapsed, necessary to en-
 “title the plaintiff to have the said cattle forwarded from Dublin
 “to Holyhead by the same steamer which the plaintiff avers duly
 “sailed from Dublin to Holyhead; but the defendants did not for-
 “ward the said cattle by said steamer, but, on the contrary, delayed
 “and detained them until the sailing of a steamer which left Dublin

"and arrived at Holyhead much later than the first-mentioned
 "steamer; and, by reason of the premises, the said cattle were
 "delayed and detained upon their said journey, and plaintiff incurred
 "all and singular the special damage in first count mentioned.

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There was also a count for non-delivery of the cattle at Huntingdon within a reasonable time.

To the first count the defendants pleaded a traverse of the contract, and a waiver of it by the plaintiff.

To the second count the defendants pleaded, first, a traverse of the contract, for the purpose and on the terms alleged. Secondly; a mutual waiver of the contract before breach, and discharge of the defendants by the plaintiff from all liability thereunder. Thirdly; "That the contract therein stated was subject to a condition, viz., "that if it should be found, on the arrival of the cattle in said "paragraph mentioned, in Dublin, that there was not room for the "conveyance of same by the steamer leaving the North-wall, "Dublin, at the hour in said paragraph stated, the defendants "should not be bound to forward said cattle by said steamer; "and defendants aver that, on the arrival in Dublin of said cattle, "there was not room for the conveyance of same by the steamer "leaving the North-wall at said hour; and the defendants aver that "the grievances in said paragraph complained of were caused and "occasioned by said want of room, and not otherwise." And, fourthly; "That the cattle in said paragraph respectively mentioned are the same cattle; and defendants say that said cattle "were delivered by the plaintiff to, and accepted and received by "the defendants, to be carried and conveyed under and subject "to a certain contract and condition, which rendered them not "liable for the loss, damages, and expenses, in said paragraph "respectively mentioned, to wit, that the Company would in no "case be responsible for the delivery of cattle or live stock at "any particular time, or for any particular market; and defendants "aver that the plaintiff's claim was a loss, within the true intent "and meaning of said condition, and not otherwise."

The case was tried by the LORD CHIEF BARON, before a special jury, at the sittings after Trinity Term 1864. The material facts

M. T. 1865. of the case are given in the judgment of the Court by Baron
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Upon the amount of damages, his Lordship left the following questions to the jury:—First, did any damages result to the plaintiff from the delay in the forwarding of the cattle, by reason of the loss of the sale of such cattle at Huntingdon or Harford?—Yes. Secondly; did any damage result to the plaintiff from such delay, by reason of the cattle, in consequence of such delay, catching the distemper; or by reason of the distemper, in consequence of such delay, exhibiting itself sooner than it would otherwise have done, and before they were sold at St. Ives on Monday the 21st, and at Bury St. Edmonds on Wednesday the 23rd of November?—No loss. His Lordship told them to bear in mind that the plaintiff would not be entitled to damages for the hastening of the breaking out of the distemper if, had there been no delay, the distemper would have shown itself before the sale. The jury assessed the plaintiff's loss, by reason of the delay in forwarding the cattle, at £51. 17s. 8d. Leave was reserved to the defendants to move, first, to enter a verdict for the defendants, as to the issues on the second and third counts, if the Court should be of opinion that there was no evidence of a contract; secondly, to reduce the damages to nominal damages on each of the counts respectively, or to such sum as the Court should think fit.

A conditional order in accordance with this ruling having been obtained—

Butt, and *Palles* and *Lyster*, showed cause.

The contract entered into by the station-master at Kells, as the authorised agent of the defendants, was to convey the plaintiff's cattle to Huntingdon by the steamer sailing from the North-wall, Dublin, on the night of the 17th of November, and to deliver them at Huntingdon within a reasonable time. That contract was clearly violated; and the transit of the cattle occupied a considerable time. There was evidence to go to the jury upon the second count, and the value of the evidence was correctly pointed out by the LORD CHIEF BARON. The condition in the risk note as to any particular

market not being guaranteed was unjust and unreasonable: *Bolckow*; *M. T. 1865.*
v. Seymour (a); *Garnett v. Willan (b)*; *M'Manus v. The Lanca-* *Eschequer.*
shire and Yorkshire Railway Co. (c); *Peek v. North Staffordshire* *MATHEWS*
Railway (d); Affirming *Simons v. The Great Western Railway* *v.*
Co. (e); *Beal v. The South Devon Railway Co. (f)*. *DUBLIN AND*
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RAILWAY.

Serjeant *Armstrong, S. Ferguson, and W. Boyd, contra.*

Parol evidence was not receivable to construe the contract. The plaintiff was well aware of the practice of the London and North Western Railway Company when putting cattle on board of their steamers. He had read the sailing bill posted at Kells, and he had frequently brought cattle by the route which he took upon the 17th of November. The proviso, as to there being room in the steam-vessel, qualified the contract entered into by the station-master at Kells with the plaintiff; and, as he was aware of the proviso, there was no evidence of a contract. The jury found that no injury had occurred to the cattle by their detention in Dublin on the night of the 17th of November; nor should any damages have been given for the detention of the cattle, when the plaintiff knew of the proviso. The loss upon the sale at St. Ivers Harford and Bury St. Edmonds was only nominal. There was no evidence of the contract to go to the jury.

Palles, in reply.

The contract was not contained in the risk note solely; it was partly in writing and partly by parol. It was a question for the jury what was the contract. The jury found that a contract as declared on had been entered into: *Harris v. Rickett (g)*; *Rogers v. Hadley (h)*; *Walker v. The York and North Midland Railway Co. (i)*; *Anderson v. The Chester and Holyhead Railway Company (k)*.

(a) 17 C. B., N. S. 107.

(c) 4 H. & N. 327.

(e) 18 Com. B. 805.

(g) 4 H. & N. 1.

(i) 2 H. & N. 750.

(b) 5 B. & Ald. 53.

(d) 10 H. of L. Cas. 473, 568.

(f) 3 Hurl. & Colts. 337.

(h) 2 H. & Colts. 227.

(k) 4 Ir. Com. Law Rep. 435.

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FITZGERALD, J., delivered the judgment of the Court.

This case was tried before my LORD CHIEF BARON and a special jury at the sittings after last Hilary Term. The plaintiff is a cattle-dealer, the defendants are carriers; and the action was in substance for delay in delivering, at Huntingdon in England, certain cattle of the plaintiff's, despatched by the defendants' railway from the town of Kells, in November last.

The only count of the plaint material to be stated is the second. It states:—That the defendants were carriers of cattle from Kells in Ireland to Huntingdon in England—that is to say, from Kells to Dublin by railway, thence to Holyhead by the steamers of a line known as the London and North Western Line, and from Holyhead to Huntingdon by railway; that, in consideration the plaintiff would deliver to them thirty-nine head of cattle, to be carried by them in manner aforesaid, from Kells to Huntingdon, and at Huntingdon to be delivered to the plaintiff, the defendants promised to forward said cattle from Dublin to Holyhead by a certain steamer, which was advertised to sail from the North-wall at Dublin, for Holyhead, at or about the hour of ten o'clock on the evening of the 17th of November 1864; that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, the aforesaid cattle, for the purpose and on the terms aforesaid; that all preliminaries necessary to entitle the plaintiff to have the cattle forwarded to Holyhead from Dublin by the said steamer, were fulfilled; that the defendants did not forward the cattle from Dublin to Holyhead by the said steamer; but on the contrary, delayed them until the sailing of another steamer, which left Dublin and arrived at Holyhead much later than the first-mentioned one; that by reason of the premises the cattle were delayed and detained on their said journey.

As special damage the plaint states, that the plaintiff intended to offer the cattle for sale at Huntingdon on Saturday the 19th of November; and by reason of the delay, the plaintiff was unable to have the cattle in Huntingdon upon that day in time to offer the same for sale. It further stated, that by reason of the premises, the cattle became and were distempered, and the plaintiff not only lost

large profits, which he would otherwise have made by the sale thereof, but was obliged to make divers journeys and incurred expenses in endeavouring to cure the cattle, in bringing them to divers places for sale, and in feeding, keeping and caring them.

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To this count the only material defences were:—First; that the plaintiff did not deliver, nor did the defendants receive from the plaintiff, the cattle for the purpose and on the terms alleged. Secondly; that the contract stated in the count was subject to a condition—viz., that if it should be found, on the arrival of the cattle in Dublin, that there was not room for the conveyance of the same by the steamer mentioned in the count, the defendants should not be bound to forward the said cattle by the said steamer; that on the arrival in Dublin of the cattle, there was not room for the conveyance of the same by the said steamer; and that the grievances mentioned in the plaint were caused by such want of room, and not otherwise. Thirdly; that the cattle were delivered by the plaintiff, to be accepted by the defendants, to be carried and conveyed subject to a certain contract and condition, which rendered them not liable for the loss, damages, or expenses in said count mentioned—to wit, that the Company would in no case be responsible for the delivery of cattle or live stock at any particular time or for any particular market; that the plaintiff's claim was a loss within the true intent and meaning of the said condition, and not otherwise. Issues were settled on these pleadings—that on the first of these defences being in the terms thereof; and those on the second and third being whether such defences were thus in substance and fact.

It appeared at the trial that the defendants are in the habit of booking cattle for through carriage from Kells, which is a station on their own line, to Huntingdon, and effecting the carriage by arrangement with the London and North Western Railway Company, who have steamers regularly sailing every day from Dublin to Holyhead; and who have a line of railway from Holyhead to Huntingdon. The line of the defendants terminates in Dublin. It appeared that a steamer was advertised by the London and North Western Company, to sail from Dublin to Holyhead, on Thursday the 17th of November 1864, at ten o'clock at night. This adver-

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tisement was contained in a paper produced at the trial, which purported to state the times of sailing of the London and North Western Company's steamers, from Dublin to Holyhead, during the month of November 1866; and which stated that cattle would be entered at through rates from (amongst other places) Kells to Huntingdon; but it contained a notice, that "cattle to be forwarded "by this route are received subject to this express stipulation, "that if it shall be found on the arrival of the cattle in Dublin "that there is not room for the conveyance of the cattle by the "next ordinary vessel of the London and North Western Railway "Company's proceeding to Holyhead, the Company shall not be "bound to forward the cattle until the sailing of the ordinary vessel "next following that of the vessel in which there shall not be room "for the cattle." This paper purports to be an advertisement of the London and North Western Railway Company; it is dated from their office in London; its heading is "London and North Western Railway Company;" it is signed by the officer of that Company, and it does not mention or refer to the defendants' Company at all. It appeared, however, that in the month of November 1864, copies of this paper were posted at Kells and at other stations on the defendants' line. It also appeared that the plaintiff had seen a copy of this paper about the 15th or 16th of November, and had learned from it the time of the sailing of the boat on Thursday the 17th.

According to the evidence of the plaintiff, he resided at Virginia-road, near to which the defendants have a station on their line; and on Wednesday the 16th of November he went to Kells, where the defendants' station-master is a person named M'Kenna, having an assistant named Cunningham; the plaintiff on that occasion saw Cunningham, but does not appear to have seen M'Kenna; he stated to Cunningham that he wanted three waggons on the next day (Thursday) for cattle to be sent to Huntingdon; that he wanted to have the cattle for sale in Huntingdon on Saturday the 19th; and he inquired at what time on the next morning the waggons would be ready, in order to enable him to ship his cattle by the boat which was to sail at ten o'clock in the evening. Cunningham

left him for the purpose, as he said, of communicating with M. T. 1865.
M'Kenna, and brought him back word that M'Kenna would send *Eschequer.*
a message for him to the Virginia-road station by a late train, *MATHEWS*
informing him at what time he ought to have his cattle in Kells. *v.*
No such message was in fact sent to the plaintiff. But it is im- *DUBLIN AND*
portant that M'Kenna did, on the Thursday morning, telegraph *DROGHEDA*
to a person named Hawkins, who is the defendants' goods agent at *RAILWAY.*
Dublin, that there would be three waggons of cattle in Dublin
for the through route, which would leave Kells by the 11:30
train on that day. This telegram was received in Dublin by
Hawkins, at eleven o'clock, and was by him transmitted to one
Roberts, who is the general superintendent of the London and North
Western Railway Company at Dublin, at about twelve o'clock. The
telegram was despatched before M'Kenna had directly communi-
cated with the plaintiff, and must of course have been so despatched
in consequence of what was communicated to him by Cunningham;
and M'Kenna admitted that it was sent for the purpose of having
room reserved in the steamer of that night for the plaintiff's
cattle.

The plaintiff stated that his reason for his so going to Kells on
Wednesday the 16th was, that there was an understanding between
M'Kenna and the cattle-dealers using his station, that if twelve
hours' notice of the intention to send cattle by the through route was
given to him, the cattle would be sent by the boat which sailed on
the day of the arrival of the cattle in Dublin; but that if such
twelve hours' notice was not given, the cattle would be sent to
Dublin at the risk of the owner as to whether they should or should
not sail by that day's boat. The existence of such an understand-
ing, and of statements by M'Kenna to cattle-dealers to that effect,
was deposed to by another witness; and though M'Kenna stated
that the object of the twelve hours' notice mentioned by him to the
dealers was to secure the having waggons for the conveyance of
the cattle from Kells to Dublin, he would not deny that he had
told them, "Unless you give twelve hours' notice it will be your
own fault if your cattle are detained in Dublin."

No message having been sent, as promised by M'Kenna, to the

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plaintiff, the plaintiff's cattle did not arrive at Kells till about noon on Thursday the 17th, and after the 11.30 train had been despatched for Dublin. On the plaintiff's arrival at Kells he saw M'Kenna, who admitted that he had failed in sending the message; but according to the plaintiff's evidence, he told the plaintiff that he had intended to send the cattle by the 11.30 train, but that if sent by a train which would start at 2.30 p.m., they would be in Dublin by eight o'clock; and that he would telegraph to Dublin to keep room for them in the boat. It appeared that there was an express train for Dublin leaving Kells at three o'clock, and which would arrive in Dublin at five o'clock; the plaintiff requested M'Kenna to send the cattle by that train, but he declined to do so, as being contrary to regulations, and the plaintiff then assented to the cattle's going by the 2.30 p.m. train. M'Kenna, who denied that he ever promised or engaged that the plaintiff's cattle should go by the ten o'clock boat on Thursday night, admitted that on the occasion of this interview he did tell the plaintiff, that the cattle would be in time for the ten o'clock boat if they went by the 2.30 train; he admitted, he had no doubt, on the occasion of that interview, that the plaintiff expected they would go by that boat, and that he himself had not the slightest expectation that they would not go by that boat.

The next thing which took place was the signing by the plaintiff of the delivery ticket or risk note (as it was called by the plaintiff). The heading of this paper is—"Dublin and Drogheda Railway (through)." It gives the name of the owner of the cattle; states him to be the consignee at Huntingdon; states the number of waggons, the number of the cattle, the rate of charge, and the amount of charge; and it contains at foot a notice, that "The Company will in no case be responsible for any damage to live stock arising from over-crowding in waggons, or for the delivery of cattle or live stock at any particular time, or for any particular market."

The plaintiff's cattle, together with the cattle of another dealer named Tully, making in all seventy-five head, were despatched from Kells for Dublin by the 11.30 train. After the cattle were so despatched, M'Kenna sent another telegram to Hawkins,

informing him that seventy-five head of cattle, for the through route, had been sent by the train; and he admits that he did this with the view of having room reserved for them in the boat of that night. This telegram was received by Hawkins at about half-past three o'clock, and was by him transmitted to Roberts at four o'clock.

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Without stating any further evidence, it seems to me impossible to deny that, unless the delivery or risk note is to be considered as constituting the whole and only contract between the parties, there was evidence to go to the jury of a contract by the defendants, through their agent, that the cattle should be forwarded by the boat of Thursday night. The plaintiff went to Dublin by the train which left Kells at three o'clock, and of course reached it before his cattle. He had some communications with the officers of the London and North Western Railway Company there, in the course of which it was admitted that the telegrams from Kells had been received, and received in time to have reserved room in the boat for the plaintiff's cattle. According, however, to the evidence given on the part of the defendants, the practice of the London and North Western Railway Company was to provide in the boat for cattle according to the time of their arrival, and without regard to telegraphic messages of expected arrivals. Some evidence also was given from which knowledge of this practice in the plaintiff might be inferred, inasmuch as, on some previous occasion, his cattle had on the same ground been refused and detained in Dublin. Finally, the plaintiff was informed on the Thursday night that there was not room in the boat for his cattle; and they continued in Dublin that night, and were shipped for Holyhead by the boat of the next evening (Friday). The London and North Western Railway Company paid the expenses of their livery in Dublin. On Saturday morning the cattle arrived at Holyhead; they were sent thence by the ordinary conveyance, a train which left Holyhead at six o'clock in the evening, and reached Huntingdon at about one o'clock in the afternoon of Sunday. It was proved that if they had gone by the boat of Thursday night they would have reached Huntingdon at about eleven or twelve o'clock on Saturday.

A part of the plaintiff's evidence was applied to showing that,
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while in Dublin, and by reason of their detention there, the cattle, or some of them, had become affected with incipient distemper, which gradually became more apparent, and affected the value of the cattle in the sales of them subsequently made. On the Sunday evening the cattle were removed a short distance from Huntingdon, in the direction of St. Ives, where there was to be a market on the Monday. They were taken to St. Ives on Monday; three of them were sold there, and the rest, with the exception of one left at St. Ives, and subsequently sold there, were taken to Bury, and there sold. There was evidence given by the plaintiff that they could have been sold at Huntingdon, had they arrived there even on the evening of Saturday; he gave evidence of his loss by not being able to effect a sale, but attributed a part of that loss to the deterioration in value occasioned by the distemper. He also gave evidence of certain expenses incurred by reason of the moving of the cattle to St. Ives and Bury, and the feeding and care of them until a sale was effected.

My LORD CHIEF BARON told the jury that they were to consider whether M'Kenna, on behalf of the defendants, engaged to forward the plaintiff's cattle by the advertised boat of the 17th of November, or whether he engaged only to forward the cattle, without any engagement that they should be taken by that boat; whether, by what passed between the plaintiff and M'Kenna, such a contract was made as the plaintiff alleged, or whether M'Kenna only engaged to send the cattle, telegraphing to Dublin that they would go, the plaintiff agreeing for the sending of the cattle, subject to the contingency that, according to the course indicated by the sailing bill, and the arrangements and practice mentioned by the officers of the London and North Western Railway Company, there might not be room for the cattle in the advertised boat, but M'Kenna not contracting that they should be conveyed by it. He told them that, if the contract alleged by the defendant was made between M'Kenna and the plaintiff, no practice of the Companies, nor arrangement between themselves, could control that contract; but that the existence of such arrangements between the Companies might be considered by them in weighing the probabilities as to

whether or not the contract alleged was in fact made. He called their attention to the strong evidence which existed of the plaintiff's knowledge of the sailing bill or advertisement of the London and North Western Railway Company, and of the stipulation which it contained, as well as to the evidence of his knowledge of the connection of the two Companies, and their practice; and he told them they were to regard such knowledge of the plaintiff, if they believed there was such knowledge, in considering whether in fact the contract alleged by the plaintiff was made. He told them that if they found that the contract made between the parties did contain the stipulation relied on by the plaintiff (that is to say, the provision contained in the sailing bill or advertisement), then they ought to find that the unqualified contract alleged in the second count was not made.

The Counsel for the defendant called on the LORD CHIEF BARON to direct a verdict for the defendants on the issue relating to the contract alleged in the second count, which he refused to do. He held, that he ought not to direct the jury in point of law, that the sailing bill, or the alleged practice, was incorporated in the contract, or formed part of the contract, or that in point of law the plaintiff should be held to have contracted in reference to the sailing bill or to the arrangements between the two Companies, or the alleged practice; but he left those matters to the jury to be considered by them in determining as to the alleged contract. This statement in the report shows very clearly the nature and form of the objection to the charge, and the grounds on which the Judge was asked for a direction.

With respect to damages, the LORD CHIEF BARON left three questions to the jury:—First; did the Company agree with the plaintiff to forward the plaintiff's cattle on their way to Huntingdon by the advertised steamer which proceeded from the North-wall to Holyhead on the evening of Thursday the 17th of November 1864?—Yes. Secondly; did the Company agree with the plaintiff to forward the plaintiff's cattle from Kells to Huntingdon within a reasonable time from their delivery to the Company?—Yes. Thirdly; if so, were the cattle forwarded from Kells to Huntingdon within such reasonable time?—No.

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From these questions and answers it seems to me plain, that the jury must be considered as having excluded from their contemplation any loss arising from the alleged deterioration of the cattle by distemper, and as having united the damages to the loss and expenses incurred by the delay in delivery, exclusive of deterioration by distemper. The Counsel for the defendants insisted that all special damage arising from delay should be excluded. The verdict of the jury, founded on the answers already stated, was for the two sums, £35. 17s. 2d. and £16. 10s. 6d., making together £51. 17s. 8d.

Liberty was reserved to the defendants to move—First; to enter a verdict for the defendants as to the issues on the second count, if the Court should be of opinion that there was not evidence of the contract alleged. Secondly; to reduce the damages to nominal damages, or to such sum as the Court should think fit.

A conditional order having been obtained by the defendants, pursuant to the leave reserved, the case has been argued before us on cause shown by the plaintiff against such order. First; it was argued that there was no evidence to go to the jury of the contract alleged in the second count; and this (as I understood the argument) on three grounds:—

First; it was said that the delivery ticket or risk note in writing, and signed by the plaintiff, constituted the only binding contract between the parties, and that no parol evidence was receivable with the view of showing any different contract.

Now, if parol evidence was admissible for the purpose of proving what the contract was, I think I have fully shown that there was evidence to sustain the contract alleged in the second count. And, with reference to the above objection in the form, that parol evidence was inadmissible for the purpose of showing what the contract was, I am clearly of opinion that in such form the objection that there was no evidence of the contract was never made at the trial. This I think is plain from the report; the recollection of my LORD CHIEF BARON confirms it; and the whole course of the trial is inconsistent with its having been taken. No objection was made to the admissibility of the parol evidence at all; nor was the Judge

called on to exclude it from the jury on any such ground. In truth, the main effort at the trial was, through the parol evidence, to incorporate into the contract the stipulation in the advertisement or sailing bill. This argument therefore I do not think open to the defendants.

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Secondly; it was said that proof of the plaintiff's knowledge of the sailing bill, and the stipulation therein contained, and of his knowledge that the through traffic in cattle was carried on by means of the London and North Western Railway Company, whose advertisement this sailing bill was, that such proof was so complete that there could be nothing sufficient to counterbalance the legitimate inference to be drawn from it, viz., that this stipulation formed a part of the contract, and that consequently no question ought to have been left to the jury. But I have, I think, shown that there was evidence of the contract, as alleged by the plaintiff in the second count; and it appears to be quite clearly settled that, in every case in which the question of what the contract is, is to be made out, in whole or in part, by parol evidence, it is impossible to withdraw from the jury that question. No question as to the weight of evidence is before us. The attention of the jury was called in the charge to the evidence—and strong evidence—of the plaintiff's knowledge of the sailing bill, and the arrangements between the Companies. They were told the effect which such knowledge might legitimately have in affecting the question left to them; and they were told to find a verdict against the contract alleged, if they thought the contract between the parties was made subject to the stipulation in the sailing bill. Assuming the parol evidence to have been admissible for the purpose of showing what the contract was, I do not see how the jury could have been further directed, in point of law, to find against the contract alleged.

Thirdly; it was said that the stipulation in the delivery or risk note, being in any event an essential part of the contract, did so completely destroy any right to damages whatever founded on delay in delivery of the cattle, as to negative the contract as alleged in the second count. This argument seems to me founded

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MATHEWS in the delivery note, and therefore not available,—the construc-
v. tion I will more particularly consider in reference to the question of
DUBLIN AND damages; for, secondly, this stipulation was particularly relied on
DROGHEDA as the ground for giving nominal damages only. It was contended
RAILWAY. that the stipulation prevented the giving of any damages in the
computation of which a consideration of the time of delivery of
the cattle constituted an element, and that no evidence was given
except of such damage. It seems to me that such a construction of
the stipulation would take away all effect from the word “parti-
cular,” and apply it to time in general. In my opinion the
stipulation does not preclude a comparison of the actual time of
delivery with what would be the reasonable time of delivery, and
giving damages founded on such comparison. It may be, I think,
rightly held to prevent the question of what is reasonable time
being affected by the known and communicated desire of delivery
at a particular time, or for a particular market, and leave the
question of reasonable time to be determined as if the contract
were simply one for delivery within a reasonable time, unaffected by
such known and communicated desire, so as to prevent any infer-
ence to be drawn therefrom; but I do not think it can do more. If
the contract were for delivery at a reasonable time, unaffected by
any other stipulation, the damage arising from late delivery as to
loss on sales would be ascertained by comparing the prices at the
time of actual delivery with the prices which could have been
obtained at the reasonable time of delivery. If the contract, as
here, contained a term that a part of the journey should be per-
formed by a specified conveyance, the case would be the same,
except that the question of reasonable time would be of course
affected by this obligation: and this, it seems to me, is the rule
to be applied to the present case, notwithstanding the defendants’
knowledge of the plaintiff’s desire communicated to them of
reaching Huntingdon on a particular day; all effect of which is
I think excluded by the stipulation. But it is in my opinion no
objection to the finding of the jury that they may have considered
Saturday as the reasonable time for the delivery of the cattle at

Huntingdon, because it was proved that the cattle which did in fact go by the boat on Thursday night reached Huntingdon in the ordinary course of conveyance at eleven or twelve o'clock on that day.

On the whole therefore I think that the cause shown ought to be allowed.

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THE summons and plaint charged that the defendants assaulted the plaintiff, and gave him into custody to a policeman, and caused him to be imprisoned in a police-office for a long space of time, to the plaintiff's damage of £100. The defendants pleaded, first, a traverse of the assault as alleged; secondly, that, before and at the time of committing said several supposed trespasses, the defendants

A bye-law of a Railway Co., duly sanctioned by the Board of Trade, declared that "each passenger not producing or delivering up his ticket, will be required to

pay the fare from the place whence the train originally started; or, in default of payment thereof, shall forfeit a sum not exceeding forty shillings."

Held (PRIGOR, C. B., *dissentiente*), that, although this specific act was not mentioned in the 109th section of the 8 & 9 Vic., c. 20, it came within the scope of the authority given by the 108th section of that Act to Railway Companies to make bye-laws "for regulating the travelling upon the railway;" and that the arrest of a passenger who refused to show or give up his ticket at a station, and whose name and residence were unknown, was warranted by the 154th section of the above statute.

An act which may result in an obstruction to the officers of a Railway Company is not a "wilful obstruction," within the meaning of the 3 & 4 Vic., c. 97, s. 16; to bring it within that section, the act must have been committed with a direct intention and tendency to obstruct.

Per PRIGOR, C. B.—The power of arrest, for the purpose of bringing the offender before a Magistrate, is limited to violations of the 8 & 9 Vic., c. 20, the bye-laws contained therein, and of the special Act of the Company.

When passengers, travelling upon branch lines to the termini of the main line, have to await the arrival of a train upon the main line to reach their destination, the terminus of the main line from which the train started is "the place from which the train originally started."

A passenger took a ticket from a station on the Cavan branch of the Midland Great Western Railway to Dublin, and was conveyed from the Mullingar Junction to Dublin, by a train which had been specially despatched from Ballinasloe, in consequence of the train from Galway having broken down: upon his refusal to give up his ticket at Dublin—

Held, that his fare from Ballinasloe was rightly demanded, notwithstanding that the tickets on the Cavan line had been inspected at the station next before Mullingar.

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were a Railway Company duly incorporated under the Midland Great Western Railway of Ireland Act 1845, and the several statutes incorporated therewith, including the Railway Clauses Consolidation Act 1845; and as such they duly made and published certain bye-laws, including the bye-law hereinafter more particularly mentioned; which bye-laws long before and at said time, when and soforth, had been duly rendered into writing, and sealed with the Company's seal, and duly approved and confirmed by the proper authorities in that behalf, and had been duly printed on boards, and duly published and affixed on the Company's stations, and duly kept so affixed, in pursuance of the statutory enactments in that behalf; and all conditions were performed, all things happened, and all times elapsed necessary to render said bye-laws valid, operative, and binding, within the meaning of the statutes aforesaid, and to render penalties thereby provided duly enforceable at the said time when, and soforth. And defendants aver that said bye-laws contained, amongst others, the provision or bye-law following:—"That no passenger will be allowed to "take his seat in or upon any of the Company's carriages, or to "travel therein upon the said railway, without first having obtained "a ticket, and paid his fare, at the respective offices or stations "of the Company on the line. Each passenger on paying his "fare will be furnished with a ticket, which he is to show when "required by the guard in charge of the train, or other officer "of the Company, and to deliver up the same before leaving the "Company's premises, upon demand, to the guard or other servant "of the Company duly authorised to collect tickets. Each passenger "not producing or delivering up his ticket will be required to pay "his fare from the place from which the train originally started, "or, in default of payment thereof, shall forfeit or pay a sum not "exceeding forty shillings." And the defendants say that, under the express provisions of the Railways Clauses Consolidation Act 1845, it was provided that bye-laws confirmed, published, and affixed in manner as said bye-laws had been and then was as aforesaid, should be observed by, and binding upon all parties to whom respectively the same was applicable. And defendants aver that

plaintiff became and was a passenger on their railway, within the meaning of said bye-laws, from a certain station on the defendants' railway to their terminus in Dublin, and was duly furnished by the defendants with a ticket as provided by said bye-law in that behalf; and defendants say that, at the termination of said journey, and when the train in which the plaintiff then travelled had arrived at Dublin aforesaid, for the purpose of enabling the plaintiff and the other passengers in said train to leave the defendants' premises, the officers of the Company duly authorised to collect the tickets demanded of the plaintiff and the other passengers to deliver up their tickets aforesaid before leaving the defendant's premises, which the plaintiff then wilfully refused to do; and thereupon said officers duly, and in pursuance of said bye-laws, demanded of the plaintiff to pay his fare, as by said bye-law provided, which he also wilfully refused to do. And the defendants aver that during all times aforesaid, when refusing as aforesaid, the plaintiff to his own knowledge had said ticket in his possession, and ready to be delivered up, had he thought fit so to do. And the defendants further aver that the name and residence of the plaintiff were respectively then unknown to the said several officers of the defendants; and thereupon one Arthur Fleming, then being the defendant's station-master, agent, and officer, and the plaintiff's name and residence then being unknown to him, caused the plaintiff to be seized and detained, for the purpose of being conveyed with all convenient despatch before a Justice of the Peace; and the plaintiff was then accordingly in fact conveyed with all convenient despatch before a Justice of the Peace, on the charge of having committed an offence against the said provisions and bye-laws, and to be duly dealt with according to law, as he lawfully might be, for the causes aforesaid; which are the several supposed trespasses in the plaint declared on.

Thirdly; that at the same time when, and soforth, the plaintiff had been such passenger on the defendants' railway, as in the second plea averred, and the defendants were such incorporated Railway Company as therein averred, and the said bye-law therein men-

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tioned had then previously been made, published, and confirmed, and was in full force, validity and effect, as in the said plea averred; and the several acts complained of happened after the passing of the statute 3 & 4 *Vic.*, c. 97; and defendants aver that the train in which the plaintiff then travelled arrived in Dublin at the termination of the journey, at, to wit, eleven o'clock at night, and stopped, in order that the passenger tickets, including the plaintiff's, might be collected, and the said passengers might be enabled to leave the defendants' premises. And defendants aver that it was requisite and necessary, for the carrying on of the duties and business of the defendants as a Railway Company, and for checking the accounts, and the due making up the books of the said Company, that all and each of the tickets that had been issued to the passengers by the said train should be duly collected, and handed over to the said Company's servants, whose business it was so to check the accounts, and make up the books of the Company. And defendants say it thereupon became and was the duty of the officers and agents of the Company, then being authorised to demand and collect the tickets, to go to the carriages then being at said terminus, and with reasonable despatch to collect, demand, and take from the passengers, including the plaintiff, their respective tickets, so that the Company's servants might be able to discharge the several passengers at the termination of the journey, and to conclude the business of the Company for the night. And the defendants' officers duly authorised to demand and collect the tickets did accordingly go to the carriage in which the plaintiff was for the purpose aforesaid, and demanded of the passengers therein, including the plaintiff, to deliver up their tickets; and several of the passengers thereupon duly delivered up their tickets; but the defendants aver that the plaintiff then wilfully obstructed and impeded the said officers and agents of the defendants in the execution of their duty upon the said railway and at said terminus, to wit, by wilfully and repeatedly refusing to deliver up to them, or any of them, the said ticket, which it was their duty to collect as aforesaid, for the purposes aforesaid, although, as defendants aver, the plaintiff then had said ticket in his possession ready to

be delivered up, had he desired so to do ; and although, as plaintiff well knew he was, by so obstructing and impeding said officers, delaying the said train at the hour aforesaid, and preventing the Company's servants from discharging the passengers and concluding the Company's business as aforesaid. And defendants say that thereupon the said officers of the Company caused the plaintiff to be seized and detained until he could be conveniently taken before a Justice of the Peace, in pursuance of the provisions of the statutory enactments in that behalf, which he lawfully might be for the causes aforesaid ; and which are the several trespasses in the summons and plaint alleged.

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Replication and demurrer by leave of the Court :—

That the second defence was not true in substance and in fact. The same to the third defence. And, as to the second defence, the plaintiff further said that same did not disclose any valid or sufficient defence in law to the action of the plaintiff. Same as to third defence.

Points of demurrer to the second defence :—

First ; because no breach of a bye-law justifies a seizure or detention, within the meaning or provision of the 8 & 9 *Vic.*, c. 20, s. 154, being the section under which said defence professes to justify the seizure and detention of the plaintiff.

Secondly ; because it is immaterial whether or not the name and residence of the plaintiff were unknown to the defendants' officers.

Thirdly ; because seizure or detention of a party offending is only justified by a violation by such party of some provision of an Act of Parliament to which such penalty of seizure and detention is attached.

Fourthly ; because the alleged refusal of the plaintiff to deliver up his ticket, as mentioned in said defence, was not a violation of any of the provisions of the 8 & 9 *Vic.*, c. 20, ss. 103 and 104, said sections being the only statutable provisions with regard to passengers upon railways offending against the traffic and other regulations for the management of railways in said sections mentioned.

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The points of demurrer to the third defence were:—

First; because said defence professes to justify the seizure and detention of the plaintiff by an alleged wilful obstruction by the plaintiff of an officer of the defendants in the discharge of his duty; and because the facts stated in said defence do not disclose a wilful obstruction within the provisions of the 3 & 4 *Vic.*, c. 97, s. 16, under which section said third defence professes to justify the seizure and detention of the plaintiff.

Secondly; because the alleged obstruction did not amount to an obstruction within the meaning of said 16th section.

Thirdly; because, even if said alleged obstruction were an obstruction within the meaning of the said 16th section, same was not a wilful obstruction within the meaning of said section.

Fourthly; because, to constitute a wilful obstruction within the meaning of said 16th section, it should be stated that plaintiff had the intention of obstructing; and the averments made in third defence do not show or state any intention to obstruct.

Fifthly; because it is consistent with the averment that the plaintiff knew he was delaying the train, and that the plaintiff had not the intention of delaying the train, and because the intention of the plaintiff might have been, consistently with said averment to effect some other object by the alleged delay in delivering or refusing to deliver said ticket to the officer of said Company.

P. McKenna, with whom was *D. C. Heron*, in support of the demurrer.

Railway companies are empowered to make bye-laws, by the 108th section of the 8 & 9 *Vic.*, c. 20 (the Railways Clauses Consolidation Act), for regulating the travelling upon or using and working of the railway. The 109th section enacts:—"For the better enforcing the observance of all or any of such regulations, it shall be lawful for the Company, subject to the provisions of an Act passed in the fourth year of the reign of her present Majesty, intituled *An Act for Regulating Railways*, to make bye-laws, and from time to time to repeal or alter such bye-laws and make others, provided that such bye-laws be not

“repugnant to the laws of that part of the United Kingdom where
 “the same are to have effect, or to the provisions of this or the
 “special Act. And such bye-laws shall be reduced into writing,
 “and shall have affixed thereto the common seal of the Company.
 “And any person offending against any such bye-law shall forfeit
 “for every such offence any sum, not exceeding five pounds, to be
 “imposed by the Company in such bye-laws as a penalty for any
 “such offence: and if the infraction or non-observance of any such
 “bye-law or other regulation as aforesaid be attended with danger
 “or annoyance to the public, or hindrance to the Company in
 “the lawful use of the railway, it shall be lawful for the Company
 “summarily to interfere to obviate or remove such danger, annoy-
 “ance, or hindrance, and that without prejudice to any penalty
 “incurred by the infraction of any such bye-laws.”

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Amongst the bye-laws and regulations made by the defendants under the latter section, the first is as follows:—1. “That no
 “passenger will be allowed to take his seat in or upon any of the
 “Company’s carriages, or to travel therein upon the said railway,
 “without having first obtained a ticket and paid his fare at the
 “respective offices or stations of the Company on the line. Each
 “passenger on paying his fare will be furnished with a ticket, which
 “he is to show when required by the guard in charge of the train,
 “or other officer of the Company, and to deliver up the same before
 “leaving the Company’s premises, upon demand, to the guard or
 “other servant of the Company duly authorised to collect tickets.
 “Each passenger not producing or delivering up his ticket will be
 “required to pay the fare from the place whence the train originally
 “started; or in default of payment thereof, shall forfeit and pay a
 “sum not exceeding forty shillings.” That bye-law introduces
 provisions relative to transient offenders, not contained in the 103rd
 section of the 8 & 9 Vic., c. 20. The latter section enacts, “If any
 “person travel, or attempt to travel, in any carriage of the Company,
 “or of any other Company or party using the railway, without
 “having previously paid his fare, and with intent to avoid payment
 “thereof; or if any person, having paid his fare for a certain
 “distance, knowingly and wilfully proceed in any such carriage

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"beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the Company a sum not exceeding forty shillings." And the 104th section goes on to enact that "If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the Company, or such other Company or party as aforesaid, and all constables, gaolers, and peace officers may lawfully apprehend and detain such person until he can conveniently be taken before some Justice, or until he be otherwise discharged by due course of law."

The refusal to give up a ticket is not an offence under the 103rd section; therefore the defendants cannot rely, as they have done in the defence, upon the 154th section—the "transient offenders" section, which enacts that "It shall be lawful for any officer or agent of the Company, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offences against the provisions of this or the special Act, and whose name and residence shall be unknown to such officer or agent, and convey him with all possible despatch before some Justice, without any warrant or other authority than this or the special Act; and such Justice shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender." *Expressum facit cessare tacitum*. This case is governed by *Chilton v. The London and Croydon Railway Co. (a)*. The 109th section of the 8 & 9 Vic., c. 20, corresponds with the 106th and 148th sections of the private Act of the defendants in that case; the 154th section of the former Act corresponds with the 165th of the latter Act. No penalty was imposed by the private Act upon refusal to deliver up a ticket; and it was held that a bye-law imposing a penalty for not doing so did not warrant the arrest of a passenger for refusing to produce his ticket, the latter not being

(a) 16 M. & W. 212.

an offence against the private Act: *Tollemache v. The London and South Western Railway Co.* (a). H. T. 1865.
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The third defence relies upon a wilful obstruction of the defendants' officer in the execution of his duty, by plaintiff, as warranting his arrest under the 16th section of the 3 & 4 Vic., c. 97. But the intent to create an obstruction must be proved, and the intention to obstruct is not even averred: *Batting v. Bristol and Exeter Railway Co.* (b). No doubt the plaintiff's refusal to give up his ticket resulted in a constructive obstruction of the defendants' officer; but in its inception his act was not a wilful obstruction.

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Falkiner, with him Serjeant *Sullivan*, and *Exham*.

The 108th section of the 8 & 9 Vic., c. 20 empowers the Company to make regulations relative to passengers upon their railway. The 109th section imposes a penalty upon "every such offence" or infraction of a bye-law made under that section; and the 111th section makes the bye-laws binding upon all parties. If from section 140 to section 160 be not a code applicable to offences under the Act, and to penalties imposed by the bye-laws made by the Company, the greatest confusion must exist, since in the latter cases no witnesses could be summoned (section 142 and 143), nor would perjury be assigned (section 160), nor would there be any appeal to Quarter Sessions (section 158). The Act treats an offence under the Act and under a bye-law as in *pari materia*, as appears from but one form of conviction being given in the schedule for offences under the Act and under the bye-laws. If, when brought before one Justice, under the 154th section, the offender against a bye-law will tell his name and address, he can be admitted to bail, as the 47th section of the 14 & 15 Vic., c. 93 (Petty Sessions Act) includes every offence. The offender will be bound to appear before the Justices under the 145th section. By the 152nd section, a person guilty of cutting or defacing the property of the Company may be compelled to pay damages in addition to the penalty imposed by the bye-law. Therefore, offences against the Act and against the bye-laws are governed by the same code. *Chilton v.*

(a) 26 Law Jour. Ex. 222.

(b) 3 Law Times, N. S. 665.

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 words of the private Act differ from those of the 8 & 9 Vic., c. 20. The officer of the Company was obstructed in his duty by the plaintiff. "Duty" means any act which the officer was bound to do in the service of the Company. The officer was certainly "impeded."

D. C. Heron, in reply.

THE LORD CHIEF BARON.

May 5.

I am sorry that I am obliged to differ from my Brothers in opinion in this case. I have not been able to surmount the difficulty which, from an early stage of the argument, appeared to me to exist in holding that the penalty mentioned in the bye-law in question is a penalty dealt with by the provisions of the 154th section of the 8 & 9 Vic., c. 20.

Without pronouncing an opinion upon the validity of the bye-law, I will assume, for the purpose of my judgment, that it is a valid bye-law duly made, under the 109th section of the 8 & 9 Vic., c. 20, for enforcing a regulation duly made within the 108th section; that is to say, that the regulation which it enforces was duly made within the latter part of the 108th section, "for regulating the travelling upon or using and working of the railway."

The 109th section, under which the bye-law was made, provides, that any person "offending against any such bye-law" shall forfeit, "for every such offence," any sum not exceeding five pounds, "to be imposed by the Company in such bye-law as a penalty for such offence."

Further, the 111th section provides, that such bye-laws, when confirmed, published and affixed as the statute requires, "shall be binding upon and observed by *all parties*." No doubt can exist, that such a penalty is recoverable under the 145th section.

And here arises the difficulty which I find in applying the 154th section to any penalty imposed by a bye-law, and *not* imposed by any provisions contained in the 8 & 9 Vic., c. 20, or in any special Act.

(a) 16 M. & W. 212.

First; the first section, providing a jurisdiction and prescribing a procedure for penalties under bye-laws, is section 145. That section enacts, in express terms, that "Every penalty or forfeiture imposed by this or the special Act, *or by any bye-law* made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceedings before two Justices." Now there *are* penalties, the recovery of which is otherwise provided for, so as to furnish a subject-matter for that proviso—namely, penalties imposed by the direct provisions of this very Act (as the sections 23, 24, 103, 144); and these penalties, I apprehend, may clearly be recovered before a single Justice under section 154; or the proceeding may, at all events, be originated before him, though it may be afterwards determined before two Justices, of whom he shall be one. On the 145th section the observation is at once suggested, that where the Legislature *intended* to include penalties imposed *by bye-laws*, they expressed that intention in plain words; and where they used words embracing "*penalties imposed by this, or the special Act,*" they, apparently, did not deem those expressions sufficient to include "*penalties imposed by bye-laws.*"

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Secondly; in several sections of the Act, the very same language is used in expressing the intention of the Legislature, that "penalties imposed by bye-laws" shall form the subject of their legislation.—[See sections 143, 145, 159.]

Thirdly; this statute constitutes a part of a code dealing with public companies, and consisting of this and other Acts passed in the same session of Parliament. In those Acts similar language is used, showing both what is expressed and what is intended to be omitted. The following provisions may be noticed in juxtaposition :—

8 & 9 Vic., c. 20.	8 & 9 Vic., c. 16.	8 & 9 Vic., c. 18.
Section 145	Section 147	
" 143	" 145	
" 159	... ..	Section 148
" 154	" 156	

Fourthly; the terms of the 154th section are very precise. The words are, "any offence against the *provisions* of this Act;"

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it is not, "any offence, made such by authority of this Act;" or even "made such by this Act;" but the power of summary arrest is applied to an offence against the "*provisions*" of the statute. It is perfectly plain that there is no "*provision*" of the Act which, in the terms of the provision itself, creates the offence now in question. And it can be an offence against the provisions of the Act in one way only—namely, constructively and by inference; and because the statute, by the 108th and 109th sections, conferred on the Company the power of making bye-laws, and made any person offending "against any such bye-law" liable to the penalty (within a prescribed limit) which it imposed. But the "*provisions*" of the bye-law are not the "*provisions*" of the statute. And it is for an offence "against the provisions" of the statute, or of the special Act, that the 154th section gives the summary power of arrest.

Fifthly; in result, I find a difficulty, which I cannot surmount, in giving an extended construction, when I am expounding a penal enactment, to words which, in their primary meaning, have a limited import. And I find it also difficult to ascribe to the Legislature any other reason for dropping in the 154th section of the 8 & 9 Vic., c. 20, and in the corresponding section (the 146th) of chapter 16, the words "or by any bye-law," which they had used in the other sections, except this, that in the section in which those words are omitted the Legislature did not mean that they should be applied. It seems to me that the construction ought to be governed by the rule—"Expressum facit cessare tacitum." In *Broom's Maxims*, p. 637, there are some excellent observations on the application of this maxim to the construction of Acts of Parliament. It is, in truth, not a technical rule of law; but a maxim of plain common sense. The obvious presumption is, that when the Legislature frames a set of provisions for a series of matters upon which it enacts a new code of regulations; and when in some provisions it expressly provides for matters distinctly defined, and in others omits to provide in terms for those matters at all, it so omits, not inadvertently, but by design, and because it intends that the omitted matters should *not* be the subject of that legislation.

We may imagine that all this resulted from the too rapid pen-
manship of a draughtsman or a clerk. So to speculate would be
very dangerous. On the other side, a speculation, quite as specious
and probable, might be urged, that the framer of the bill, when it was
passing through Parliament, omitted the provision because he felt
that it would create opposition which would insure its rejection; and
that he introduced and passed the bill in the shape in which it
became law, for the very purpose of its being considered as *not*
legislating for the omitted matter. And I confess I am disposed to
be the more careful in applying, in the case now before us, the rule
of construction to which I have referred, because to construe the
Act otherwise would be to confer upon the Railway Company for
the first time a power of summary arrest in reference to their own
bye-laws; such a power of summary arrest having been before
confined to offences of their own officers and servants alone.

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The 3 & 4 *Vic.*, c. 97 was passed expressly for regulating
railways. By that statute the provision was enacted which re-
quired the sanction of the Board of Trade to bye-laws made by a
railway company. That statute contemplated bye-laws made under
the powers given by special Acts to railway companies; no such
statute as the 8 & 9 *Vic.*, c. 20 being then in force. It also con-
templated proceedings for recovery of penalties imposed by such
bye-laws (section 7); and it contains an express enactment (in
section 13) giving a summary power of arrest of officers and
servants of the Company. But it withheld that power in reference
to strangers; for it contains no such provision as to them.

Again, the 8 & 9 *Vic.*, c. 20, in sections 103 and 104 contains
express provisions, giving a summary power of taking offenders
before a Magistrate in certain specified cases. These two sets of
provisions, taken together, appear to me to indicate that the Le-
gislation contemplated "the travelling upon, using, and working" a
railway, without any such summary power, save in cases specified
in the 103rd and 104th sections of the 8 & 9 *Vic.*, c. 20, when they
passed the statute.

In the course of the discussion certain sections of the Act were
referred to as furnishing an argument in favour of the defendants'

H. T. 1865. construction of the 154th section. I thought during the argument
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 that there was some force in some of those topics. On consideration,
 I do not think they can properly influence the construction of this
 section of the Act of Parliament. First; it was said that the word
 "bye-law" was omitted in section 148, yet that section 148 must
 apply to penalties imposed by bye-laws. And that is true; but the
 words are, "where, *in this or the special Act*," any sum of money,
 "whether in the nature of a penalty or otherwise, is directed to
 "be levied by distress," &c. Those words bring the case in terms
 within the 145th section, and the following sections—sections 146,
 147, 148, 149. By the 145th section a penalty imposed by a bye-
 law is made in express terms recoverable in the manner there
 prescribed; and when a conviction is had for the penalty, it is
 recoverable by distress of goods—[section 146, &c.]

Secondly; it was said that "bye-law" is omitted from section
 151, which provides a limitation of time within which proceedings
 shall be brought, and that this ought to be treated as applying
 to penalties under bye-laws. The words are, "any penalty or
 "forfeiture imposed *by virtue of* this or the special Act, or any
 "Act incorporated therewith." Now, a penalty imposed by a
 bye-law is *in terms* by the 109th section imposed *by virtue of*
 this Act—that is, under a power which the Act confers on the
 Company. But the "*provisions*" of the bye-law are not, on that
 account, "*the provisions of this Act*." An argument was also
 drawn from section 152, in which the words are, "penalty imposed
 by this or the special Act." It appears to me that this section
 (which omits all reference not only to penalties imposed by bye-
 laws, but also to penalties imposed by *any Act incorporated*
with the special Act, and which only expresses, "penalty imposed
 by this or the special Act") was framed in these terms for the very
 purpose of excluding a cumulative remedy, of damages as well as
 penalty, from every case in which by express provision a penalty
 was not imposed "by this Act" or by "the special Act" from
 which the Company derived its special powers.

Thirdly; it was said that the power of appeal under the 157th
 section would not exist if the omission of the word "bye-law" in that

section would exclude the right of appeal from convictions for bye-law penalties. But this argument is I think founded on a misreading of that section. The words, "under the provisions of this or the special Act," are not to be read in connection with "penalty or forfeiture:" they are to be read in connection with "determination or adjudication of any Justice." And this is plain from the 153rd section of this Act, in which the words "under the provisions of this or the special Act" are used in immediate connection with the word "jurisdiction."—[See also 8 & 9 Vic., c. 16, ss. 159 and 155.]—The jurisdiction to summon witnesses, as stated in the 153rd section, and the jurisdiction from the exercise of which the appeal is given by section 157, are both plainly "under the provisions of this Act," and not under any bye-law.

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Fourthly; the comparison of the 154th section with sections 153 and 155 was relied on as showing that, as "bye-law" was omitted in section 155, and as that section refers to a form of conviction, it is reasonable to treat section 155 as comprising cases of offences against bye-laws, in order that, by the help of the interpretation clause, the form given for a conviction by two Justices, under their jurisdiction conferred by the 147th and succeeding sections, should be used by *one* Justice under the jurisdiction conferred by section 154.

(a) Now it is not obligatory to employ the form of conviction given in the schedule. The 155th section says, "*may* cause the conviction," not "*shall*," or "*shall and may*."

(b) There is nothing to prevent the single Justice from adopting the form under the 154th section, *whatever* be its construction.

(c) The 154th section prescribes no form of proceeding at all. The series of sections, beginning with section 145, does provide a form of procedure; but it is wholly inapplicable to the proceeding commenced by a summary imprisonment under section 154. The 155th section does certainly deal with proceedings before two Justices; and, unquestionably, it affords an argument indicating that the Legislature contemplated the use of the common form of conviction in the schedule, in all cases in which two Justices

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should act; and two Justices *are* to act in reference to *bye-law penalties*, under section 145, and those which follow it. This section therefore, thus considered, does afford an argument in favour of the defendants' construction. But it would be impossible to apply the provisions of this section to penalties imposed by an Act incorporated with the special Act; and yet such penalties (on which a period of limitation is expressly provided by the 151st section) would seem to require the provisions of the 155th section as much as those of section 151. To all this the observation seems to me to apply—" *si voluit non dixit.*"—[See section 160, which expressly includes the incorporated Acts.]

Fifthly; it is said that the 160th section, providing for prosecutions for perjury, would be inoperative in reference to such prosecutions if the plaintiff's construction should prevail. But the words of that section clearly include *every* examination on oath "under the provisions of this Act, the special Act, or any Act incorporated therewith." A proceeding under any section, whether the 145th or 154th section, would be a proceeding "under this Act."

Sixthly; a similar observation applies to the argument drawn from section 158 to that drawn from section 157.—[See before (3).]

On the whole, the conclusion at which I have arrived is, that the 154th section of the 8 & 9 Vic., c. 20, does not apply to the proceeding relied on in the defence demurred to; that the demurrer ought to be allowed, and that judgment on the demurrer, as to this defence, ought to be given for the plaintiff. The majority of the Court being of a different opinion, judgment must be given for the defendant. Of course I entertain the views which I have stated, with all the distrust which must attach to them in consequence of the opinions entertained by my Brothers. They however receive some sanction from what fell from Baron Platt, and also in some degree from what was said by Baron Alderson and Baron Rolfe, in the case of *Chilton v. The London and Croydon Railway Company* (a); although the observations made by those learned

(a) 16 M. & W. 212; 5 Rail. Cas. 4; 16 Law Jour., N. S., Ex. 89.

Judges were certainly not necessary in that case for sustaining H. T. 1865.
their judgments. *Exchequer.*

With respect to the demurrer to the other defence, I entirely concur in the opinion of my Brothers, that the plaintiff is entitled to judgment.

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FITZGERALD, B.

By the 108th section of the 8 *Vic.*, c. 20, a railway company is authorised to make regulations for the purpose, among others, of regulating the travelling upon the railway. By the 109th section, for better enforcing the observance of all or any of such regulations, the Company is empowered to make bye-laws; and any persons offending against any such bye-laws shall forfeit for every such offence any sum not exceeding £5, to be imposed by the Company in such bye-law as a penalty for any such offence. By the 111th section, such bye-laws, when confirmed, published and affixed, as directed by the Act, shall be binding on and be observed by all parties, and shall be sufficient to justify all persons acting under the same. I am of opinion that the first of the bye-laws of the Company in the present case was a bye-law for regulating the travelling upon the railway, and within the scope of the authority given by the 108th and 109th sections. That being so, and the bye-law having been confirmed, published and affixed, as directed by the Act, I think that it became binding, under the 111th section, on the plaintiff, as a passenger travelling by the defendants' railway; and that the plaintiff, offending against it, became liable, under the 109th section of the Act, to the penalty of forty shillings mentioned in the bye-law, and was an offender against the provisions of that section. The 154th section of the Act provides that it shall be lawful for any officer of the Company to seize and detain any person who shall have committed any offence against the provisions of the 8 *Vic.*, c. 20, or the special Act, and whose name and residence shall be unknown to such officer, and to convey him with all convenient despatch before some Justice, without any warrant or other authority than the 8 *Vic.*, c. 20, or the special Act. The plaintiff having committed an offence against the provisions of the 109th section—

H. T. 1865. *that is, an offence for which under the express provisions of that section he became liable to a penalty; and his name and residence being unknown, he was, I think, under the 154th section liable to be detained and to be carried before a Justice.*
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I think the argument derived from the fact that certain sections of the Act mention offences against the Act, the special Act and the bye-laws, while some omit the bye-laws, is insufficient to show that offences for which penalties are directly imposed by the Act are not offences against the Act, because the definition of the offence is only to be had from the bye-laws.

With respect to the other questions in the case, I think that the offence of impeding or obstructing the officers of the Company in the execution of their duty must be the doing of some act the chief and immediate tendency of which is to obstruct and impede; and not an act which merely may have that effect under the circumstances, and in fact.

HUGHES, B., concurred with FITZGERALD, B.

DEASY, B.

The Legislature has provided for the punishment of two classes of offences by the 8 & 9 Vic., c. 20; but it left the punishment of other offences to be provided for by bye-laws, to be made by any railway company, provided they were sanctioned by the Board of Trade; and when so sanctioned, the 154th section of the above statute became operative. In ninety-nine cases out of one hundred the name and residence of the offender must be unknown to the officers of the Company; and unless the 154th section applied to bye-laws made by the Company, the provisions of that section could not be carried out. When once a penalty has been imposed upon an act committed by a passenger, that act becomes an offence under the 8 & 9 Vic., c. 20. I do not think that the words in the 154th section, "or any bye-law made in pursuance thereof," are sufficient to exclude bye-laws made by the Company, and duly sanctioned.

Demurrer to the second defence overruled.

Demurrer to the third defence allowed.

The case was tried before the LORD CHIEF BARON, at the sittings H. T. 1865.
after Michaelmas Term 1865. The following issues were knit:—

1. Did the defendants commit the trespasses, or any or either of them, in the plaint mentioned?

2. Is the second defence true in substance and fact?

3. Is the third defence true in substance and fact?

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It appeared in evidence that, upon the 4th of October 1864, the plaintiff took a third-class ticket from Crossdoney (a station between Cavan and Dublin) to Dublin, and paid six shillings and ninepence for it, and got into the train, which started from Cavan for Dublin at 5.20 p.m. At that time a train started from Longford at 5.45 p.m., which joined the Cavan train at the Cavan Junction, and then both trains ran in one train into Mullingar, a station on the main line between Galway and Dublin. The passengers by the Cavan train change carriages at Mullingar; the carriages from Longford and Sligo are attached to the train from Galway, and run through into Dublin. The tickets of passengers coming on the Cavan line to Dublin are examined at Multyfarnham, a station close to Mullingar. The tickets of passengers travelling from Galway to Dublin are examined at Castletown, the next station west of Mullingar. The train by which the plaintiff travelled should have met the four o'clock p.m. train from Galway to Dublin at Mullingar at about 7.30 p.m.; and by that train, due in Dublin at about ten o'clock p.m., the plaintiff should have been conveyed to Dublin. The train which started from Galway on the evening in question broke down near Athenry. From Ballinasloe, the next station *en route* to Dublin, part of the disabled train, in the nature of a special train, was as soon as possible despatched to Dublin. This special train conveyed the plaintiff and the other passengers by the Cavan and Longford lines, who had been waiting at Mullingar for nearly two hours, to Dublin, which they reached at midnight, some two hours behind the proper time. The remainder of the Galway train reached Dublin shortly afterwards. The plaintiff refused to give up his ticket when asked to do so at the ticket platform; whereupon the ticket collector demanded that he should pay 7s. 7d., the third-class fare from *Ballinasloe*, as "the place from which the train

H. T. 1865. originally started." Upon the plaintiff's refusal to give up his ticket, and to pay the fare from Ballinasloe, he was brought to the police-office,—which was the imprisonment complained of.

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At the trial his Lordship told the jury that Ballinasloe was the place from which the train originally started; he directed the jury to find for the plaintiff on the first issue; and bearing that in mind, he left the issue founded on the second defence to them. The jury were discharged from finding on the third issue. Leave was reserved to the plaintiff to move to enter a finding for the plaintiff on the second count, if the Court should be of opinion that his Lordship should have directed the jury that Ballinasloe was not the place from which the train originally started, and that he ought to have directed them that the portion of the defence had not been sustained which alleged that the plaintiff refused to pay the fare according to the bye-law. The jury found for the defendants.

A conditional order in the terms reserved having been obtained by the plaintiff—

Carleton (with whom was *Exham*) showed cause.

The train by which the plaintiff was carried to Dublin was the four o'clock, p.m., train from Galway. That train broke down, and started afresh from Ballinasloe; therefore Ballinasloe was the place from which the train originally started on the main line. Unless that train started from Galway on ordinary occasions, and from Ballinasloe upon the night in question, passengers on the Cavan and Longford lines could not have got to Dublin. The plaintiff had his ticket, and wilfully refused to give it up.

Dearden v. Townsend (a).

D. C. Heron and *M'Kenna*, contra.

Mullingar was the station from which the train started to Dublin; therefore 4s. 3d. only, the third-class fare from Mullingar should have been demanded from him.

Exham was not called on in reply.

(a) 1 Law Rep. 10.

PRIGOR, C. B., delivered the judgment of the Court.

We are of opinion, that Ballinasloe must be taken to have been "the place from which the train originally started," within the provision of the bye-law set forth in the defence of the defendants.

Upon the trial the following matters appeared in the evidence, without contradiction :—The railway of the defendants was opened from Galway to Dublin in 1851. The line called the Longford deviation was opened in 1855 ; the Cavan Branch line, which joins the Longford line at the Cavan Junction, was opened in 1856 ; and the Sligo Branch line was opened in 1862.

A train leaves Galway at four o'clock in the afternoon, which ought to reach Dublin some time before ten o'clock. A train leaves Longford at 5.45. A train leaves Cavan at 5.20, and passes through Crossdoney on its way to the Cavan Junction. The train from Galway to Dublin passes through Ballinasloe and Mullingar. The Cavan train meets the Longford train at the Cavan Junction ; and that united train meets the Galway train at Mullingar. There (in the language of Mr. Fleming, the station-master acting at Broadstone) "it becomes a composite train, from Mullingar to Dublin."

The usual course is for the Cavan passengers to change at Mullingar into the Sligo carriages, which come on by the Longford line ; and the Cavan carriages return by the Cavan Branch line. Whether this course was adopted on the evening in question the station-master did not know ; because "there was so great a pressure on the line, that some carriages may have come on."

The train which leaves Galway at four o'clock is known as the "four o'clock train," because it leaves Galway at that hour. The Cavan and Sligo train joins it at Mullingar.

On the 4th of October 1864 an accident happened to the four o'clock Galway train between Woodlock and Athenry, nearer (as I collect) to Galway than Ballinasloe. That train was a Parliamentary train. The train that left Cavan at 5.20 was also a Parliamentary train. The plaintiff entered that Cavan train at Crossdoney, paying his fare and obtaining a ticket. When the train arrived at Mullingar, the Galway train not arriving, the

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plaintiff and the other passengers remained there until the arrival of a train which came from Ballinasloe, after a delay of nearly two hours. That train was in the nature of a special train from Ballinasloe; and the carriage in which the plaintiff travelled from Mullingar was brought with that train to Dublin, where it arrived at Broadstone, a short time before twelve o'clock. The Galway Parliamentary train arrived shortly after, about two hours later than its usual hour of arrival. That (in the language of the station-master) constituted the broken down part of the Galway train. According to the statement of the station-master, that Galway train, in the usual course, would have taken up the Longford carriages, and the plaintiff and others in it; and then it would become a composite train from Mullingar to Dublin.

It appeared, further, that according to the practice of the Company, the tickets of passengers coming from Ballinasloe and Galway are examined at Castletown, the last station on the line towards Dublin, before reaching Mullingar. The tickets of the Cavan passengers are examined at Multifarnham, the last station towards Mullingar, on the Cavan and Longford line before reaching Mullingar.

The fare from Crossdoney was 6s. 9d.; from Cavan 7s. 1d.; from Ballinasloe 7s. 9d.; and from Mullingar 4s. 3d. All these were the third-class fares of Parliamentary trains. Such appear to be the material facts to which we are called upon to apply the bye-law.

It cannot be denied that the terms, "the fare from the place from which the train originally started," though perfectly clear when applied to a single line, are calculated to lead to some embarrassment under certain circumstances in which there are a multitude of lines running, some into others, all supplying trains which become united before their arrival at the station at which the passenger, by the bye-law, is required to deliver up his ticket, or to pay "the fare from the place from which *the* train originally started." If a passenger, as to whom the officials of the railway terminus are utterly ignorant of the place where he joined *any* train, be found at the Euston terminus of the London and North Western Railway in

London, it may be very difficult to assign the place from which "the train" originally started—whether Holyhead, or Liverpool, or Glasgow, or Edinburgh, or Aberdeen. It appears to us, however, that in the present case little difficulty exists in applying this by-law. The train by which the plaintiff would have been travelling when he reached Broadstone, if no accident had occurred, would have been a train known and recognised as the four o'clock train from Galway. According to the proved usage, the carriages of the Cavan line (the line on which the plaintiff commenced his journey) came no further than Mullingar; and therefore they there ceased to constitute the Cavan train. The Sligo carriages, according to the usage, proceeded from Mullingar to Dublin; and in some of those carriages the Cavan passengers, according to usage, proceeded to Dublin. But it would be a misapplication of language to call those carriages, when they left Mullingar, a Sligo train, any more than a Cavan train, or a Mullingar train; for, as they belonged to the same Company, passengers might have entered into any of them at any part of the line from Mullingar to Dublin, as well as into any of the carriages which had come from Ballinasloe or from Galway. And if any such passenger, arriving in Dublin by the "composite train," had refused to show his ticket, it would be difficult to maintain that "*the* train" (which was one, and not several) was a train which originally started from Sligo, if he happened to be found in a Sligo carriage, and a train which originally started from Galway if he were found in a carriage which had in fact come from Galway. One of the officials of the railway (Fay, the ticket-taker) stated, in his evidence, that "it was impossible for him, or any one discharging his duty, to know how these particular carriages were situated that night." And Mr. Fleming, the station-master, said that "there is nothing in the colour of the carriages to distinguish them." The evidence sufficiently showed, that the line from Galway to Dublin was the main or trunk line of that set of railways, the ultimate terminus of which, at Dublin, was at Broadstone; and that all the other lines were branch lines, made for the purpose of being connected, by that main or trunk line, with Dublin. The evidence also showed that the character of the trains was conform-

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able to the character of the lines on which they travelled; that the main and principal train was the train from Galway to Dublin; and that the trains which came on the branch lines, as soon as they joined the main or trunk railway, became part of that main and principal train. The circumstances which occurred on the night in question afforded the strongest proof that the trains on the branch lines bore, to the train from Galway to Dublin, the relation which I have described. The Cavan train was plainly dependant upon the Galway train for the transport of its passengers to Dublin. On its arrival at Mullingar, the Galway train having been stopped by an accident, the Cavan passengers were delayed at Mullingar for nearly two hours, until a train, coming from the Galway direction, and started from Ballinasloe, took the place of the Galway train in aid of the Cavan train, and thus afforded to the Cavan passengers the opportunity of proceeding with it to Dublin.

It was argued, for the plaintiff, that, since the object of the 8 & 9 Vic., c. 20, ss. 103, 109, and 111, and of the bye-law, was to prevent fraud; and since the tickets of all the passengers from places more distant from Dublin than Mullingar were examined at Castletown and Multifarnham, and since every passenger who was suffered to pass those places must have had, and have shown, his ticket, Mullingar (the next station after the tickets had been shown) ought to be treated as the place from which the train originally started. It was urged that this would be enough to protect the Company against fraud; and that, construing the bye-law in reference to the purpose of preventing fraud, we ought to hold Mullingar as the place of the original starting of the train. But this would be to treat the same train as having originally started from a different place according to the station at which the tickets were examined. So that if, on the line from Galway to Dublin, the tickets were examined at four stations, and four passengers, leaving the train successively at the stations next after the examination of their respective tickets, should refuse each to show his ticket at the station at which he should leave the train, each would be liable to pay only the fare from the station at which his ticket was last examined; and thus the train would be determined to have

originally started from four distinct places. Such a construction of the bye-law would seem to be absurd in itself, and to be hardly capable of being expressed without a solecism. The argument of Mr. *Carleton* appears to me very persuasive, and to present a good index to the true import of the bye-law. A number of passengers arrive at the Dublin terminus. The bye-law is framed to provide against the contingency of any one passenger, or of any number of passengers, refusing to deliver their tickets. The officials of the Company have no means of knowing the place where each passenger commenced his journey, or even the line, whether a branch line or the main line, on which his ticket was obtained. No guard could be reasonably expected to determine the identity of the passengers, and the places at which they entered their carriages. The passengers may have changed their carriages in the progress of the journey. Even if they did not, the carriages are not distinguishable. And if the guard who acted when the passenger entered could possess the power of identifying him, the guard of a branch line may not, and probably will not, be the guard of the main line, and the guard of the main line may be changed before its arrival in Dublin. We must give to the bye-law a reasonable construction, and one which, being consistent with its language, shall tend to effectuate its purpose, in preference to one which would augment the difficulty of applying it. And we think that the train in which the plaintiff arrived at Broadstone on the occasion in question on which he refused to deliver his ticket there, was *that* train which, on the evening of the transaction, did the service of the four o'clock Galway train; and that was the special train, originally started from Ballinasloe, with which the plaintiff travelled to Dublin.

The point saved must therefore be ruled in favour of the defendants, and the cause shown against the conditional order must be allowed, of course with costs.

I cannot refrain from adding, that I think it would be very desirable that a bye-law more precise in its terms and better suited for a number of converging lines should be framed for the protection of railway companies; and that such bye-law (which of course must be sanctioned by the Board of Trade) should be

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H. T. 1865. adopted by all the railway companies in both countries. It is very
Exchequer. important that such a regulation should be the same for every line,
 BARRY so that whenever any question should arise in a Court of Law upon
 v. its construction, as applied to any railway, the decision upon it
 MIDLAND should afford a uniform rule for all.
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A lease contained a proviso that it should be lawful for the lessee to surrender the premises to the lessor, "first giving unto the lessor, &c., &c., six months' previous notice in writing of such intention to surrender, paying off all rent and arrears of rent that shall or may be due, including the day of such surrender taking effect, and performing all covenants," &c., &c. Notice of surrender for the 25th of March 1863 was served by the lessee upon the lessor; but the rent then due was not paid for some months afterwards.

THIS was an action of ejectment on the title, for 78a. 1r. 14p. of the lands of Derry or Caheraderry. Title was claimed from the 27th of March 1865. Defence was taken by the defendant to all the lands, save 5a. 3r. 34p., in the possession of another person. The case was tried before the LORD CHIEF BARON, at the Summer Assizes for the county of Limerick 1865.

By lease, dated the 25th of April 1800, the representatives of Anthony Hickman deceased demised to Charles O'Callaghan, his heirs and assigns, for three lives, the lands of Derry or Caheraderry, containing 228a. 2r. 24p., plantation measure, at the yearly rent of £1. 6s. 0d. per acre. That lease contained a clause of surrender in the following terms:—"Lastly, it is hereby declared and agreed
 "upon, by and between the parties to these presents, that it shall
 "and may be lawful for the said Charles O'Callaghan, his heirs or
 "assigns, on any 25th day of March during the continuance of this
 "demise, to yield up and surrender these presents, and the premises
 "hereby demised, unto the said J. A. &c., &c., (the lessors), their
 "heirs or assigns, or such other person or persons as shall or may be
 "entitled to the rent and reversion of the said demised premises, as

Held, that no surrender took place under the proviso in the lease; that no new tenancy was created; and that, under the facts in the case, a surrender could have taken place, or a new tenancy have been created, only by deed.

“co-heirs or representatives of said Anthony Hickman deceased, E. T. 1866.
 “first giving unto the said J, A, &c., &c., (the lessors), their heirs Exchequer.
 “or assigns, or such other person or persons as shall or may be M'GRATH
 “entitled to the said demised premises as aforesaid, six calendar v.
 “months' previous notice in writing of such his or their intention to SHANNON.
 “surrender the same, paying off all rent and arrears of rent that
 “shall or may be due, including the day of such surrender taking
 “effect; and performing and fulfilling all and singular the clauses,
 “covenants, conditions, and agreements hereinbefore on his or their
 “part or behalf mentioned or contained.” The lessee's interest in
 the above demise became vested in Cornelius O'Brien, who, by a
 deed, dated the 29th of February 1825, demised unto Patrick Shan-
 non (the defendant) all that the said lands of Derry or Caheraderry,
 containing 225 acres, or thereabouts; exclusive of the Mill division,
 containing 6 acres, or thereabouts; Magan's division, containing
 2 acres, or thereabouts; Hugh Clare's division, containing 6 acres,
 or thereabouts: to hold to the said Patrick Shannon, for three lives,
 at the yearly rent of £312. 17s. 0d., being at the rate of £1. 7s. 0d.
 per acre for the above mentioned quantity, subject to a survey to be
 made thereof, and the said rent, &c., increased or reduced accord-
 ingly. Then followed this proviso:—“And it is hereby agreed
 “upon, by and between the said parties, that the said Cornelius
 “O'Brien shall be at liberty, notwithstanding this demise, to sur-
 “render the entire of said premises; and the said Patrick Shannon
 “doth covenant, to and with the said Cornelius O'Brien, his heirs
 “and assigns, that he will, upon receiving due notice of such the
 “intention of the said Cornelius, his heirs and assigns, to surrender
 “said premises, yield and deliver up the part hereby intended to be
 “demised.”

In 1828 Cornelius O'Brien purchased the interest of one of the
 four lessors in the lease of 1800; and by a deed dated the 30th of
 January 1856 he conveyed the lands in question to William H.
 Magrath the plaintiff, as trustee for specified objects.

A partition suit was instituted in 1857 by the lessors in the lease
 of 1800. Upon the 8th of May 1861 James Shannon the defendant

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purchased the interest of one of the four lessors in the lease of 1800, and was made a party by notice to the partition suit. On the 2nd of September 1862 the plaintiff served notice of his intention to surrender his interest under the lease of 1800 upon the defendant, as one of the co-reversioners; and at the same time served a notice of surrender upon the defendant, as tenant under the lease of 1825, of his intention to surrender his interest in the lands in question. By the return to the writ of partition, dated 19th of July 1863, part of the lands of Caheraderry conveyed by the leases of 1800 and 1825 was allotted to a person of the name of Tymons, the remainder to the plaintiff. In the schedule to the allotment to Tymons, the defendant was described as being in occupation of 72a. 3r. 9p., Irish plantation measure, of the lands in question, at the yearly rent of £200, "as tenant from year to year." In the schedule to the allotment to the plaintiff, the defendant was described as being in occupation of 9a. 3r. 0p., at the yearly rent of £83. 15s. 6d., "as tenant from year to year." The residue of the lands of Caheraderry was in the possession of the subtenants of the defendant.

On the 2nd of March 1863 the defendant moved to set aside the return to the writ of partition, upon the grounds that the allotment of the lands had not been justly made—that the quit-rent had not been fairly apportioned, and that he had been wrongly described as tenant from year to year of the lands of Caheraderry.

Defendant's motion was refused with costs upon the 30th of April 1863. The defendant refused to give up possession of the lands in March 1863, and paid the rent of the lands allotted to him under the deed of partition to the lessors in the lease of 1800. Upon the 4th of September 1864 the plaintiff served the defendant with a notice to quit for the 25th of March 1865. Upon the 25th and 26th of March 1865 the land agent of the plaintiff, as representative of the lessor in the lease of 1825, and the land agent of the co-reversioners in the lease of 1800, attended upon the lands of Caheraderry, and demanded possession for their respective principals, which the defendant refused to give. He gave up possession to Tymons of the portion of the lands of Caheraderry allotted to

him. In answer to a demand for the rent for the year 1864, under the lease of 1825, the defendant paid the agent of the plaintiff, on the 14th of May 1864, one year's proportionate rent due the 25th of March 1864, for the lands allotted to him.

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At the close of the case, the Counsel for the plaintiff called upon his Lordship to tell the jury that, if the rent paid in May 1864 was not any aliquot portion of the rent payable under the lease of 1825, nor expressly paid or received as the rent reserved by the lease of 1825, such payment, in point of law, created a tenancy from year to year, which operated as a surrender of the lease of 1825.

Counsel for the defendant called for a direction for the defendant, upon the grounds (among others) that an actual surrender by deed was necessary to terminate the lease of 1800; that it was a condition precedent to the clause of surrender taking effect that the rent should be paid; but that it had been proved that the rent for 1863 had been neither paid nor tendered, and that the description of the defendant as tenant from year to year, in the schedule to the return to the writ of partition, was immaterial. The jury found that the defendant had paid the rent demanded in 1864 on foot of the lease of 1800, and not under a new tenancy. His Lordship directed a verdict for the plaintiff, but reserved leave to move to change the verdict into one for the defendant.

A conditional order, on the ground of misdirection, having been obtained—

W. Brereton, J. E. Walsh, and Cree, now showed cause.

The notice of surrender by the plaintiff, in September 1862, terminated the defendant's interest under the lease of 1825, and made him tenant from year to year. He was described as such in the report of the partition commissioners; he admitted it, by surrendering to Tymons the portion of land allotted to him, and by paying the apportioned rent. The defendant is estopped from denying the results of his own acts: *The Duchess of Kingston's case* (a); *Cornish v. Abingdon* (b); *Lyon v. Reed* (c).

(a) 2 Sm. L. Cas. 723.

(b) 4 H. & N. 549.

(c) 13 M. & W. 285.

E. T. 1866. The notice of surrender terminated the lease of 1825: 1 *Furlong's*
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SHANNON. *Landlord and Tenant*, p. 618. A surrender need not necessarily be
 in writing. Abandonment of the premises by the tenant, and the
 taking possession of them by the landlord, as here, is equivalent to
 a surrender by operation of law: *Phene v. Popplewell* (a).

Jellett, J. O'Hagan, and M. O'Shaughnessy, contra.

The clause of surrender in the lease of 1800 was a covenant, not
 a condition: *Co. Litt.*, p. 203, *b*; *Doe d. Wilson v. Phillips* (b);
 4 *Bythewood's Conveyancing by Jarman*, p. 362. In reference to
 the service of a notice of surrender, every formality must be observed
 strictly: *Cole on Ejectment*, p. 397. The original notice should
 have been produced: 3 *Starkie on Evidence*, p. 730. The deri-
 vation of the plaintiff's title was not satisfactorily traced: *Delap v.*
Leonard (c); *Doe d. Rutzen v. Lewis* (d); *Denny v. O'Connell* (e).
 The defendant objected to the description of his interest in the
 lands as given in the report of the partition commissioners. There
 was no change of possession, nor was there any new lease there-
 from; there was no surrender by operation of law: *Crawley v.*
Vittie (f); *Foquet v. Moor* (g). The payment of the apportioned
 rent was not a surrender, nor did it create a new tenancy; *Twynam*
v. Pickard (h); *Grey v. Friar* (i); *Moore v. Butler* (k). The
 circumstances under which, and the object for which the rent
 was paid by the defendant in 1864, was a question for the jury:
 2 *Taylor on Evidence*, p. 296. The notice served upon the de-
 fendant was not correct as to time, therefore void: *Cadby v. Mar-*
tinez (l); *Doe d. Rodd v. Archer* (m); *Doe d. Murrell v. Mil-*
ward (n). The interest created by the lease of 1825 was freehold,
 therefore could not be terminated without ceremony. *Co. Litt.*,
 p. 214, *b*. As to the analogy between powers in Equity and

(a) 12 Com. B. 334.

(c) 5 Ir. Law Rep. 292.

(e) Long. & Towns. 629.

(g) 7 Exch. 370.

(i) 4 H. of L. Cas. 565.

(l) 11 Ad. & Ell. 720.

(b) 2 Bing. 13.

(d) 5 Ad. & Ell. 227.

(f) 7 Exch. 319.

(h) 2 B. & Ald. 105.

(k) 2 Sch. & Lef. 267.

(m) 14 East. 245.

(n) 3 M. & W. 328.

conditions at Common Law—1 *Saunders on Uses*, pp. 155, 163; *E. T. 1866.*
Gorman v. Byrne (a). The service of the notice of surrender was Exchequer.
not duly proved; the original was not produced by the plaintiff, nor *M'GRATH*
was its absence accounted for: 1 *Taylor on Evidence*, pp. 420, *v.*
421; 2 *Starkie on Evidence*, p. 174; *Robinson v. Brown* (b); *SHANNON.*
Lanauze v. Palmer (c); *Furnace v. Ahearn* (d). The conditional
limitation in the second lease could not be acted upon until the
condition upon which the first lease was to terminate was complied
with. This is a conditional limitation, and was lost upon assign-
ment: *Bac. Abr., Lease* (4), (5).

J. E. Walsh, in reply.

FITZGERALD, B.

The question at the trial of the ejectment in this case was, *T. T. 1866.*
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whether the defendant was, in the month of September 1864, tenant
from year to year to the plaintiff. In that month a notice to quit
the lands the subject of the ejectment, on the 25th of March 1865,
was served by the plaintiff on the defendant; and the present
action was founded on that notice to quit.

The case made by the defendant is, that he was not tenant from
year to year, but held, and still holds the lands in question under a
subsisting lease made in the year 1825 to him by a gentleman
named O'Brien, under whom the plaintiff derives title. That a
lease for lives, which are still in being, was made to the defendant
in the year 1825 by O'Brien; and that the plaintiff's title is derived
from O'Brien is not disputed. But the plaintiff's case is, that the
estate granted by this lease was put an end to prior to September
1864. The plaintiff alleges that this determination took place in
either of two ways:—first; by the acceptance of a tenancy from
year to year, which would be a surrender in point of law; or,
secondly, by virtue of a provision contained in the lease of 1825.

First; with reference to the former of these matters, the case of
the plaintiff appears to me to be in substance this:—At the date of
the lease of 1825, O'Brien held the lands under a lease made in the

(a) 8 Ir. Com. Law Rep. 394.

(b) 3 Com. B. 754.

(c) 1 Moo. & Mal. 31.

(d) 4 Ir. Law Rep. 281.

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year 1800, for lives, some of which are still in being, but different from those in the lease of 1825; and at a rent less by one shilling per acre than the rent reserved in the lease of 1825. The lease of 1800 was made to O'Brien by four tenants in common of the fee, between whom no partition had then been made; and it contains a provision enabling O'Brien to surrender on any 25th day of March during the demise, first giving six months' previous notice in writing of his intention so to do. The lease of 1825 was made in terms provided O'Brien's interest should so long last, and contained a clause enabling O'Brien to surrender notwithstanding the demise of 1825, and an agreement by the defendant, on getting due notice of his intention so to do, to give up possession. O'Brien subsequently acquired the share of one of the co-owners of the fee, and this interest, as well as his interest in the lease of 1800, became vested in the plaintiff previously to 1857. In 1857 some of the co-owners of the fee instituted a suit in Chancery for a partition, to which Magrath was made a party; and, pending the suit, the defendant purchased the interest of one of the co-owners, and was made a party by notice.

A commission of partition was decreed in 1857 or 1858; and, pending the proceedings of the commissioners thereunder, and in the month of August 1862, the plaintiff alleges that he served notice on all the co-owners (including the defendant) of his intention to surrender the lease of 1800 on the 25th of March 1863; and he at the same time gave notice to the defendant, as tenant under the lease of 1825, of such his intention, with the view of putting an end to the latter lease. The commissioners of partition made their return in the month of February 1863; the subject of partition included many other denominations of land; and they allotted a part of the lands comprised in the leases of 1800 and 1825 to a person named Tymons; and all the residue of those lands to the plaintiff. In a schedule to the return, all those lands are mentioned as being in the possession of the defendant, as tenant from year to year, at a rent which appears to be equal in amount to the rent reserved in the lease of 1800, but no reference is made to the lease of 1800, or to the lease of 1825.

The defendant appears to have been dissatisfied with the particular lands allotted to him as co-owner, and moved the Court of Chancery to set aside the return; and in an affidavit made by him for that purpose, he stated, amongst other things, that the return incorrectly represented him as holding the lands now in question as tenant from year to year, whereas he in fact held them under a lease; this motion was refused with costs. After this, and on the 25th of March 1863, possession of the lands comprised in the lease of 1825 was, pursuant to the notice of August 1862, demanded of the defendant; but no surrender in fact was ever made of the lease of 1800. The defendant refused to give up possession. On the 12th of May 1864 the plaintiff demanded from the defendant a year's rent up to the 25th of March 1864, stating the amount of rent so demanded, which was in fact his proper proportion of the rent mentioned in the schedule to the commissioners' return. Conveyances under the decree for partition had previously been made to the plaintiff and Tymons. The demand of rent was made by letter; but the letter does not in any way state the nature of the tenancy in respect of which it was demanded. On the 14th of May 1864 the defendant answered this letter, inclosing a cheque for the amount demanded, after some deductions for poor-rate and income tax. This payment, which was of a different amount from that reserved in the lease of 1825, was, under the circumstances, relied on at the trial of the ejectment as evidence of a new tenancy from year to year.

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In the month of September 1864 the plaintiff and Tymons served the defendant with several notices to quit their respective portions of the land comprised in the leases of 1800 and 1825, on the 25th of March 1865. On that day the defendant delivered up possession of his part to Tymons, but declined to give possession of the residue of the lands to the plaintiff, who then brought the present ejectment.

The defendant was examined at the trial as to the payment of rent so made by him in May 1864; and his account of the matter was, that he paid it as the proper proportion of the rent payable under the lease of 1800, in respect of the lands allotted to the

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plaintiff. Two reasons have been suggested for this; first, a conception that payment of the rent reserved by the lease of 1800 was necessary for the preservation of his interest under the lease of 1825; and, secondly, a misconception of the legal effect of the union in the plaintiff of the two interests in the fee, and in the lease of 1800. The defendant's own account of the matter is somewhat obscure; but he certainly never informed the plaintiff of any intention of paying the rent, or any part of the rent reserved by the lease of 1800. On this part of the case the plaintiff insisted at the trial that he was entitled to a direction to the jury that a new tenancy from year to year was created between the plaintiff and defendant, which operated as a surrender in law of the lease of 1825, if then subsisting, and entitled him to a verdict. The defendant, on the other hand, insisted that there was no evidence to go to the jury of a tenancy from year to year; and that there could not be a surrender in law of such an interest as he then had.

My LORD CHIEF BARON left to the jury the question whether the payment in May 1864 was made by the defendant with the intention of paying rent under the lease of 1800, or as rent under a new letting; but, as I understand the case in substance, informing the jury that if not intended by the defendant as rent under the lease of 1800, it must be referred to a new letting. The jury found that the payment was made by the defendant as rent under the lease of 1800. The plaintiff objected to the putting of this question to the jury; but neither party, though called on by the LORD CHIEF BARON so to do, suggested any other question as proper to be left to them. On this part of the case it seems to me impossible to sustain the plaintiff's contention, that the Judge should have directed the jury to infer a tenancy from year to year in the defendant, without allowing his explanation of the single payment made in the year 1864 to go to them. The form of the question does not seem to me objectionable; the rent was not in terms demanded as rent due in respect of a tenancy from year to year, in fact it corresponded in amount with the rent reserved by the lease of 1800, as regarded the plaintiff's share of the lands; and no representation was made by the defendant

that it was paid in respect of a tenancy from year to year. The payment seems to me an act which, like every other act *in pais*, is capable of being explained, and the effect of which must depend on the intention, not of one, but of both parties; and my Lord was not asked to put the question arising on the defendant's explanation in any other form.

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This view of the case renders it unnecessary to consider the defendant's contention, that there really was no evidence of a tenancy from year to year or surrender in law. It seems to me also impossible to contend successfully that the decree in the partition suit, founded on the commissioners' return, can be treated as deciding that the defendant was tenant from year to year; the description of his tenancy was a purely collateral matter in that suit; and, treating it as a representation made to the defendant that he was such tenant, it was not acquiesced in by him, but denied by his affidavit.

I think, therefore, that the plaintiff's first contention fails. Secondly; his second contention is founded on the notice already stated to have been served by him on the defendant in August 1862, of his intention to surrender the lease of 1800, and founded on a provision in the lease of 1825, together with the demand of possession made pursuant to that notice in March 1863. The provision in the lease of 1825 is as follows:—"And it is hereby agreed upon, by and between the said parties, that the said Cornelius O'Brien shall be at liberty, notwithstanding this demise, *to surrender the entire of said premises*; and the said P. Shannon doth covenant to and with the said C. O'Brien, his heirs and assigns, that he will, upon receiving due notice of *such* the intention of the said C. O'Brien, his heirs or assigns, *to surrender said premises*, yield and deliver up the part hereby intended to be demised." However in other respects, this clause may have been intended to operate, it seems clear that it was only to have operation for the purpose of giving effect to a surrender made by O'Brien or his assigns of their interest; and the plaintiff's contention is, that such surrender was effected by force of a provision in the lease of 1800; and the notices already mentioned, which he

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The provision in the lease of 1800 is as follows:—"Lastly,
 "it is hereby declared and agreed upon, by and between the parties
 "to these presents, that it shall and may be lawful for the said
 "C. O'Brien (the lessee), his heirs or assigns, on any 25th day
 "of March during the continuance of this demise, to yield up and
 "surrender these presents, and the premises hereby demised, unto
 "the said J. A., &c. (the lessors), their heirs or assigns, or such other
 "person or persons as shall or may be entitled to the rent and rever-
 "sion of the said demised premises as co-heirs or representatives of
 "the said Anthony Hickman deceased, *first giving* unto the said J.
 "A., &c., their heirs or assigns, or such other person or persons
 "as shall or may be entitled to the said demised premises as
 "aforesaid, six calendar months' previous notice in writing of such
 "his or their intention to surrender the same, *paying off all rent*
 "*and arrears of rent that shall or may be due, including the day*
 "*of such surrender taking effect*, and performing and fulfilling all
 "and singular the clauses, covenants, conditions and agreements
 "hereinbefore, on his or their part or behalf, mentioned or con-
 "tained." It is obvious that the latter part of this clause, com-
 mencing with the word "first," is one sentence, the whole of
 which is governed by that word.

The notices of intention to surrender are alleged to have been
 served in August 1862; and the day thereby fixed for the surrender
 to take effect was the 25th of March 1863; but the rent which
 became due on that day was not then paid, nor was it paid until
 a considerable time after. Without considering any other of the
 objections made on the part of the defendant to this transaction, I
 think that this failure would be of itself sufficient to have prevented
 a surrender, or rather determination of the estate, then taking effect;
 and for this the case of *Gray and others v. Friar* (a) seems to be
 an express authority. I think, therefore, that the plaintiff's second
 contention also fails.

My LORD CHIEF BARON in form described the verdict to be

(a) 4 H. of L. Cas. 565.

entered for the plaintiff, reserving liberty to the defendant to move to have the verdict entered for him; in pursuance of which leave the defendant has obtained a conditional order. I think the cause shown by the plaintiff ought to be disallowed, and a verdict entered for the defendant.

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To avoid complicity of statement, I have treated the leases of 1800 and 1825 as comprehending the same premises; in point of fact the lease of 1825 did not comprehend all that was contained in the lease of 1800; but this in no way affects the question before us.

FIGOT, C. B.

I concur in my Brother FITZGERALD's judgment, and his reasons, with only the exception which I shall now mention.

I am not satisfied that if, in this case, a tenancy from year to year could have been created by the payment of rent referable to such tenancy, the intention of the defendant to refer the payment to the lease of 1800, uncommunicated to the plaintiff, was sufficient to rebut the presumption of a tenancy from year to year arising from the payment and the other facts proved, especially the fact that the defendant had given up possession to Tymmons, of Tymmons' partitioned portion of the lands (comprising all of Caheraderry that had not been allotted to the plaintiff), and the fact that the defendant knew that, whether rightly or wrongly, he had been treated in the return of the commissioners of partition as tenant from year to year; although I do not think that any estoppel was created by that document, or by the proceedings founded upon it.

I prefer resting my judgment, as to this part of the case, upon the view urged by Mr. *O'Hagan* in his very able argument—namely, that the lands retained by the defendant, which are the subject of the defence in this ejectment, and which alone were in controversy between the plaintiff and the defendant at the trial, have been, during the whole time since the plaintiff's interest arose under the partition, in the possession of under-tenants holding immediately from the defendant; that during the time, and of course when the rent was paid, the plaintiff and defendant were (upon the plaintiff's review of his own title) owners of reversions;

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SHANNON. and that since the possession of the lands was not changed, and was not at all affected by the dealing between the plaintiff and defendant, and since that dealing could only be between the owners of reversions, a surrender by operation of law could not have been caused by the creation of a new tenancy, unless such new tenancy had been created by deed.

HUGHES and DEASY, BB., concurred.

Conditional order that verdict be entered for defendant made absolute.

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 Nov. 14, 17.

ALICIA DORAN *v.* JOHN CHANCELLOR.*

Plaintiff served a plaint on the 23rd of October, and filed it on the 9th of November, but gave no notice of filing to defendant. On the 9th defendant served notice to amend plaint. On the 11th plaintiff served cross notice consenting to amend; and on the 13th, Court made an order, on consent, staying proceedings until certain amendments made and certain costs paid. No amendments made, and no costs paid. On the 12th of May 1866, plaintiff issued another writ for the same causes of action.

This was an action for assault and false imprisonment. The summons and plaint was issued on the 14th of May 1866; the defendant pleaded another action pending. The plaintiff took issue, and the case was tried before Mr. Baron DEASY at the Nisi Prius sittings after Trinity Term. It appeared at the trial that another writ for assault and false imprisonment had been issued by the plaintiff against the defendant on the 12th of October 1865, and served on the 23rd of October. This writ was filed on the 26th of November, but no evidence was offered at the trial that any notice had been given to the defendant of this filing, as required under the 37th section of the Common Law Procedure Act (*Ir.*) 1853.

On the 9th of November defendant's attorney served notice of an application to set aside the first count. On the 11th of November plaintiff's attorney served notice consenting to amend and pay costs. On the 13th of November the Court made an order allowing plaintiff to amend on payment of certain costs to defendant. On the 22nd of November defendant's costs, under this order, were taxed to £6. 0s. 5d. On the 27th of November a *fi. fa.* was issued

Held, these facts sustained a plea of another action pending.

* Before the Full Court.

for these costs, but was never lodged with the Sheriff. The costs were not paid, nor was any further step taken in the action up to the date of the trial. At the trial defendant was not allowed to give any evidence as to the transactions complained of, except in mitigation of damages. Plaintiff's Counsel admitted that the causes of action in both plaints were the same. The Judge ruled that the first action was not pending when the second plaint issued, but reserved leave to the defendant to move to have the verdict entered for him, if the Court above should be of opinion that the ruling was wrong. The jury found a verdict for the plaintiff, £50 damages. Counsel for the defendant having obtained a conditional order pursuant to the leave reserved—

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Heron (with him *Waters*) now showed cause.

Nothing was done after the order of the 13th of November. The 37th section of the Common Law Procedure Act (16 & 17 Vic., c. 113), provides for enforcing a defence. It first provides for enforcing a defence where the writ is filed four days at the least before the time for pleading thereto has expired. Secondly; a defence may be enforced where the writ has not been filed within this time. In the latter case the plaintiff must file his writ and give notice of it to the defendant, and the defendant is then to plead within eight days from the service of such notice. *Thompson v. Armstrong* (a) decides that, under the 37th section, a cause is out of Court after six months from the service of the summons and plaint. The first cause was out of Court here on the 23rd of April. *Mullin v. Bonjor* (b): there the filing of the writ was invalid as in this case. This case follows the principle of the old cases: *Cooper v. Nias* (c); *Bourke v. Macartney* (d). The 37th section has been substituted for the old General Order, No. 49 G. O. of 1850. By that a plaintiff was "out of Court" unless he declared within six months after the defendant's appearance. Once the cause out of Court, all further proceedings must be null. As for the liberty to amend, that was obtained by the defendant; and that

(a) 1 Ir. Jur., N. S. 335.

(b) 5 Ir. Com. Law Rep. 475.

(c) 3 B. & Ald. 271.

(d) 6 Ir. Law Rep. 29.

M. T. 1866. cannot keep the cause pending, 'for if so it is pending still, and will be for ever.—[FITZGERALD, B. It might waive the want of notice to defendant.]—That has nothing to do with it: *Worley v. Lee* (a).
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Meredith (with him *Dowse*) in support of the conditional order.

The question is, what becomes of an action at the expiration of six months from the service of the writ, where the defendant has filed no defence, and the plaintiff has not marked judgment. The concluding proviso of the 37th section only meant that plaintiff shall not be able to enforce a defence after six months, unless within the six months he has filed his writ in either of the ways allowed by that section. We served notice of motion on the 9th of November, and the cross notice was an admission that the cause was still pending. I admit that the 178th General Order appears to be limited to cases after defence filed; but the practice of all the Courts is to apply it to cases where defence has not been filed. Under the old practice, a late appearance would be irregular; but that irregularity might be waived by the acts of the parties: *Pollard v. M'Dermot* (b). Our notice of motion, and the cross notice of the plaintiff, waived the necessity of notice to the defendant.—[FITZGERALD, B. Well, then, within what time can the plaintiff amend?]—She could amend still. If she had amended on the 22nd of April, according to plaintiff's argument, the case would still be out of Court on the 23rd; yet, by the Common Law Procedure Act, she would be entitled to two days after notice of amendment to plead. If a party seeks to mark judgment after amendment made, he has only to go into the office and produce notice of the amendment; and so, motion to amend must be taken as conclusive admission of notice of the filing. In *Thompson v. Armstrong* the writ never was filed.—[HUGHES, B. You argue that we may assume, from the conduct of both parties, that the writ was duly filed.]—Not one of the steps contemplated by the 37th section for enforcing a defence were taken in *Mullin v. Bonjor*. The order to amend is a consent order, and not the usual form, as it does not limit the time

(a) 2 T. R. 112.

(b) 1 Smy. R. 1.

to amend; and plaintiff being entitled to amend under that order, we could take no step.—[FITZGERALD, B. Section 44 is rather with you on that point.]—*Lord Clifden v. Bolger* (a) contains the law on defence of another action pending. *Richardson v. Daly* (b) shows that defendant can come in and defend where plaintiff cannot compel him to do so.

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Dowse.

Assume, first, that notice of filing the writ was served. The order of Nov. 13 was not an order restraining further proceedings; it was an order restraining the plaintiff from amending without paying the costs; nothing was necessary to be done by plaintiff to enforce a defence: the 44th section shows this. It does not follow, that because a plaintiff cannot enforce a defence his case is out of Court. *Ferg. Practice*, p. 472; *Kennedy v. Gregg* (c). It exists still to prevent his commencing another action without entering a rule to discontinue. If the writ is filed, the defendant cannot have judgment of *non-pros*. By section 21, no writ can be in force for purposes of service after six months; and section 34 gives power to substitute service within the six months. Section 37 does not provide that the action shall be at an end, only that no step shall be taken to enforce a defence. I maintain that this means that the writ can be filed within six months. The writ in this case is filed, and was so on the 13th of November; and we were then bound to plead, had it not been for the order of Court of that date.

Waters, in reply.

There was either a service of notice of filing or not; if there was no service, plaintiff could not enforce defence: *Mullin v. Bonjor*. The 44th section must be read with section 37 in this case. A service on defendant is necessary to entitle plaintiff to mark judgment. The action is at an end when the plaintiff cannot enforce defence. Section 37, and the 178th General Order, apply to different cases.

Cwr. adv. vult.

(a) 6 Ir. Jur., N. S. 102.

(b) 7 Dow. Prac. C. 26.

(c) 10 Ir. Law Rep. 558.

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Nov. 17.

FITZGERALD, B., this day delivered the judgment of the Court.

This case comes before the Court on a point reserved by my Brother DEASY at the trial before him. The action was one for malicious prosecution; the only defence was a plea of another action pending for the same cause. The jury found for the plaintiff, with £50 damages; and the only question for us is whether, upon the facts proved at the trial, a verdict ought to have been directed for the defendant.

The summons and plaint in the present action issued on the 14th of May 1866. Another summons and plaint, unquestionably for the same cause of action, had issued at the suit of the present plaintiff, against the present defendant, on the 12th of October 1865, and was served on the defendant on the 23rd of the same month. That summons and plaint was in the ordinary form, and required the defendant to appear and answer the complaint within twelve days after service. By the 37th section of the Common Law Procedure Act 1853, a summons and plaint so served is ineffectual in order to enforce an appearance at the time therein mentioned, unless filed four days at least before such time has expired. By filing the summons and plaint it becomes a pleading, and stands in the place of a declaration under the old law. The summons and plaint so served on the 23rd of October 1865 was not in fact filed until the 6th of November 1865, which was too late for enforcing an appearance and defence at the time mentioned in the writ. The same 37th section of the Act, however, provides "that in case such summons and plaint shall not be filed within the time, it shall be sufficient for the purpose of enforcing a defence, after the filing of the same, to give notice of the filing to the defendant, and such defendant shall have eight days from the service of such notice to file his defence thereto." There was no direct evidence at the trial that any such notice of filing the summons and plaint in the action of 1865 was served on the defendant. The 37th section of the Act further provides, that "in no case shall the plaintiff be at liberty to proceed to enforce a defence after the expiration of six months from the service of such summons and plaint."

The contention of the plaintiff is that, on the expiration of six months from the 23rd of October 1865, the action of 1865 was so discontinued, out of Court, or determined, as not to be a *placitum pendens* when her present action was commenced in May 1866. This construction of the 37th section of the Act was disputed in the argument before us; and it was contended that its effect was not to discontinue, put out of Court, or determine the action; none of which words are used in the Act; but only to take from the plaintiff the power of prosecuting it, unless the defendant should think fit to appear *gratis* and defend; still leaving the action alive for the defendant's benefit, either for the purpose of pleading thereto, which the 39th section enables him to do "at any time before judgment," or as a protection against the vexation of a second action for the same cause. And it was further argued that, upon any other construction, the defendant would have no remedy for his costs, because the motion for an order in the nature of a judgment of *non-pros.* can only be made in the case of a summons and plaint not filed in fact. In the view I take of the case, it does not appear to me necessary to determine that question; and I shall assume, without so deciding, that in the present case, if nothing more than I have mentioned had occurred, the action of 1865 would have been, by the effect of the 37th section, so discontinued, out of Court, or determined, as not to sustain a plea of *placitum pendens*. But there was proved at the trial an order of the Court made on the 13th of November 1865, after the summons and plaint had been filed, being an order in terms made on the consent of the plaintiff and defendant. It appears from the order itself that it was made on the motion of the defendant, and on notice by him; and the object of such motion was to set aside the first count of the summons and plaint for certain causes mentioned in the notice, but such notice does not appear to have been given in evidence or read at the trial of the present cause. It further appears from the order, that a notice of the 11th of November 1865 had, previously to the order being made, been served on the defendant by the plaintiff; but neither was such notice given in evidence or read at the trial. The order gives the plaintiff

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M. T. 1866. liberty, on the consent of the defendant, to amend the first count of the summons and plaint, without limiting any time within which such amendment is to be made, on the terms of paying to the defendant all costs incurred up to the time of serving the plaintiff's notice mentioned in the order. After the date of that order nothing was done in the action by either party; no costs were paid by the plaintiff to the defendant, and no amendment was made.

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Under the Common Law Procedure Act 1853, there is no formal appearance of the defendant entered of record before the filing of his defence; and the 39th section provides that an appearance and defence shall be filed together. The 52nd section, however, provides that "any defendant served with any writ of "summons and plaint in any action shall thereupon be deemed to be "in Court for the purpose of making application to the Court or a "Judge to compel the plaintiff to give security for costs, and for "other like purposes." Now, it must be remembered that the summons and plaint is process only, and not a pleading, until filed, when it becomes such.

The motion of the defendant on which the order of the 13th of November 1865 was made, and which was a motion to set aside the first count only of the summons and plaint in the former action, plainly treats it as a pleading, and therefore filed. When that motion therefore was made, the defendant had notice in fact that the summons and plaint was filed. But he also had then been served, as appears on the face of the order, by the plaintiff with a notice of the 11th of November; pursuant to which it is quite plain that the order was made, and which order treats the summons and plaint as a pleading, and therefore filed.

It seems to me, therefore, that the defendant must, when the order of the 13th of November was pronounced, be considered as having been served with a notice of the filing of the summons and plaint. It seems to me perfectly clear that, after the order of the 13th of November, at all events, the defendant never could have treated the filing of the summons and plaint as a nullity, so as to make application for an order in the nature of judgment for *non-pros.* under the 38th section of the Act. The 44th section

provides, that "when an amendment of any summons and plaint M. T. 1866.
"hereby directed to serve as a declaration (*i. e.*, when filed) is Eschequer.
"allowed, no new requisition to plead thereto shall be necessary; DORAN
"but the defendant shall be bound to plead within the time v.
"specified in the original requisition, or within two days after CHANCELLOR.
"notice of the amendment, whichever shall last expire, unless
"otherwise ordered by the Court."

Assuming, therefore, the defendant to have been served with notice of the summons and plaint filed when the order of the 13th of November was produced, no new proceeding to enforce a defence would have been necessary—the order for amendment under the 44th section binds the defendant to appear and defend; the notice of amendment only serves to fix the time within which such appearance and defence must be made; and the order, which fixed no time for amendment, must, I think, be considered as keeping the action alive, at least so long as it was in force, which would be, by the practice of the Court, for a year.

It seems to me, therefore, that the first action was pending at the time the second action was brought; and that the jury ought to have been so directed; and, consequently, I think that the conditional order ought to be made absolute.

PIGOT, C. B., HUGHES and DEASY, BB., concurred.

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Queen's Bench

THE QUEEN, at the prosecution of SARAH M'CAWLEY
 and PATRICK M'CAWLEY,

v.

JOSEPH FISHBOURNE.*

(*Queen's Bench.*)

Nov. 14, 15.

M.'s lands were injuriously affected by a Railway Co., and A applied verbally to arbitrator sitting at N. to assess compensation. Arbitrator refused compensation, on the ground that none of M.'s lands were taken. On an application for a *mandamus*, Counsel urged that, though the ground of refusal was erroneous, yet that the *mandamus* ought not to go, as there was no written claim for compensation, as directed by statute.

Held (dissentiente O'BRIEN, J.), that the arbitrator was not precluded from raising this objection now.

Held also, that the objection was decisive against M.'s right to a *mandamus*.

IN Easter Term 1864 (May 5th) the Court granted a conditional order for a *mandamus* to compel the defendant, as an arbitrator duly appointed by the Board of Works, under the provisions of the Railways Act (Ireland) 1851, to hear and determine the prosecutors' claim in respect of their lands having been injuriously affected by the Great Southern and Western Railway Company when making their branch line from Roscrea to Birdhill; and to assess compensation to the prosecutors for the damage so done to their lands.

The lands in question were situated in Silver-street, in the town of Nenagh. On part of the lands three small cottages had been built; and there was frontage room enough to build three more on the remaining space. The Great Southern and Western Railway Company, for the purpose of making a bridge over the branch line from Nenagh to Birdhill, changed and raised the road in front of the prosecutors' houses and premises, and thereby prevented egress from and ingress to the land at the side and rear of the houses, and left that portion intended for building quite useless for such purpose.

The Railway Company also, in February 1864, built a wall by the side of the altered road, which was raised within two or three feet of the frontage of the building ground. Patrick M'Cawley stated in his affidavit that when Mr. Fishbourne (the defendant) attended at Nenagh for the purpose of assessing the value of the land, and the damages sustained by the several parties from whom land had been taken for the railway extension; and also the injuries done to the

* Before the Full Court.

lands injuriously affected by the execution of the works, the deponent applied to Mr. Fishbourne to inquire into and assess the damage to be done to the said premises by the Railway Company; but that Mr. Fishbourne refused to do so, as it was not referred to him by the Company.

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An affidavit was made, as cause, by Mr. Fishbourne, who expressed his willingness to obey any decision of the Court, and admitted that he was applied to by the prosecutor M'Cawley to enter upon the investigation of claims made by him in respect of alleged injuries caused by the works of the railway extension to Birdhill; but averred that, upon examination of the maps, plans, and schedules, placed before him by the officers of the Board of Works, he ascertained that the lands of the prosecutors were not included therein, or referred to at all; and also that the name of any person or party in respect thereof did not appear as owners, lessees, or occupiers therein or thereon; and the Company not consenting, he declined to entertain M'Cawley's claim, or to inquire into it; "that he conceived he was then acting according to law, "and that he had not then, nor has now, any jurisdiction to investigate the claim."

W. Ryan (with him *Heron*) now moved the Court to make absolute the conditional order, notwithstanding the cause shown.

The defendant apparently thought that, where the land injuriously affected had not been actually taken by the Company, the party injured had no remedy for consequential injuries. The contrary, however, has been decided in *The Queen v. Rynd* (a). The defendant also mistook the meaning of the Railways Act (Ireland) 1851, s. 4, which does not make it necessary that the lands injuriously affected should appear on the maps and plans. It is said that the defendant is now *functus officio*, and cannot act any more. But if he has omitted any portion of his duty, he will not be *functus officio* until he has fulfilled the entire of it. The prosecutors cannot obtain redress in an action; so that this is their only remedy.

Serjeant *Sullivan* (with *Coffey*), in reply to the LORD CHIEF

(a) 8 Ir. Jur. 202; S. C., 16 Ir. Com. Law. Rep. 29.

M. T. 1864. *Queen's Bench.* JUSTICE, said that he appeared nominally on behalf of the defendant; but that substantially the defence was made by the Great Southern and Western Railway Company; and contended that the application must be refused, because it did not appear that the prosecutors had ever sent in to the arbitrator a written notice of their claim. The sending to him of such a notice is made, by the Railways Act (Ireland) 1851, s. 8, a condition precedent to the obtaining of compensation. There are good reasons why the arbitrator should be supplied with a written claim, so that he may know what he is asked to do.—[O'BRIEN, J. Was there, in point of fact, any notice in writing sent?]*Heron.* A written memorial was sent to the Railway Company; but no written notice has been sent to the arbitrator.

Serjeant *Sullivan.*—No written notice was served on the arbitrator, who, without it, has no jurisdiction in the matter.—[LEFROY, C. J. It is the same as if a Court was asked to go on in a case without a summons and plaint.]

Heron, in reply.

This technical objection was never put forward in any affidavit or writing, but is made for the first time in the argument.—[FITZGERALD, J. It is a matter of fact that should have appeared on the prosecutor's affidavit when the conditional order was moved for.]—Service on the arbitrator, by the claimant of compensation, of a written notice of claim is not essential to create the arbitrator's jurisdiction: it is merely pointed out by the Act as convenient. There is not any evidence that the Company gazetted the appointment of the arbitrator, as the statute requires them to do.—[FITZGERALD, J. If that notice was not duly given he could not act, and you could not call upon him to assess compensation.]—But the publication is merely a directory matter. Irrespective of the publication of the notice, the prosecutors' common law right of action was gone once the appointment was made: *Moore v. Great Southern and Western Railway Company* (a). If the Company had omitted to gazette the appointment, would the award be valid?

—[LEFROY, C. J. We will answer that question when the case arises.]—But that is a test. In the section dealing with the traverse of the award there is no reference to the notice of claim for compensation. Section 9, though silent about a notice in writing, gives the arbitrator a jurisdiction to proceed; it does not make a notice in writing the foundation of the claim, but makes the claimant's appearance before the arbitrator to substantiate the claim the first step. That is the course of procedure when the claimant's lands have only been injuriously affected; though a notice in writing must be served if the lands have been actually taken. The publication mentioned in section 8 is merely an advertisement that the arbitrator will, on a certain day, attend in the appointed place. The arbitrator never made the objection which is now raised. Often the proprietor of lands injuriously affected cannot, before the inquiry, know that an injury will be done to them; for the arbitrator has power to order private accommodation works to be made; and these very works sometimes necessitate the application to the arbitrator by the proprietors of lands adjoining the railway.—[HAYES, J. No such excuse exists in this case.]—The only question is, had the arbitrator jurisdiction to entertain this claim?—[FITZGERALD, J. No; the question is, whether the Court is to issue a *mandamus* to compel him to do an act for which the proper foundation has not been laid.]—This technical objection should not be listened to, as the arbitrator never made it at Nenagh.—[O'BRIEN, J. Perhaps your better argument would be that, at the time when the claimant could have rectified his mistake, this objection was not communicated to him at all; but the application was refused on another and a different ground.]

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LEFROY, C. J.

The majority of the Court are of opinion that there was a defect in not having served a notice of the claim in writing. It occurs to me that it was a most essential ingredient in the claimant's case under the Act of Parliament, in order to ascertain definitely beyond a doubt, first the party's claim; and secondly what was decided—that is, the subject-matter of decision—so that thereafter it might

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It does not appear here to have been so done; and that which was to be ascertained, which was to be the subject-matter of decision, was not specified. You might as well say, as it occurred to me to say before, that you could dispense with the summons and plaint in an ordinary action, as dispense with the claim which was to be the subject-matter of the arbitrator's decision.

We are of opinion that the Act of Parliament provided a necessary, substantial preliminary, which the party has not complied with. It is a condition in the Act of Parliament that there is a certain time before or within which the arbitrator should proceed with reference to the time of the service of the notice. How then could it be considered as immaterial when the jurisdiction of the arbitrator does not arise until within a certain period after that service? It is a substantial condition. Therefore, so far as my own judgment goes, I think in this case we cannot make the order absolute against the Railway Company. They have appeared here to resist this motion, and they have shown sufficient substantial ground of objection.

O'BRIEN, J.

In my opinion the conditional order for a *mandamus* should be made absolute. It appears that, when the prosecutor made his claim before the arbitrator, the only ground upon which it was opposed by the Company, or rejected by the arbitrator, was, that the prosecutor was not entitled to any compensation for injury done to his lands, inasmuch as none of his lands were to be taken by the Company. And this is also the ground of objection relied on in the affidavit filed for the Company as cause against the conditional order. According to the decision of the Court in the case of *The Queen v. Rynd*, already referred to, that ground of objection is clearly untenable; but, during the argument, the

Counsel for the Company have further contended that, under the 8th and 9th sections of the Railways Act (Ireland) 1851, it was necessary that the prosecutor should make a statement of his claim *in writing*; and that as he did not do so, the claim should not have been entertained or adjudicated on by the arbitrator. They contend that the 8th section controls the operation of the 9th; and that thereby the power of the arbitrator is limited to the investigation of such claims only as should be made *in writing*. The 8th section provides that the Company shall publish, in manner therein mentioned, certain notices requiring that all persons claiming any interest in the lands required for the purposes of the railway (and specified in their maps or plans), or claiming to have compensation for any injury to any lands injuriously affected by the execution of the works of the Company, should deliver to the arbitrator, within the time therein specified, a short statement *in writing* of the nature of such claim. The 9th section provides that "the arbitrator shall, after the expiration of the period within which *such* claims are required to be delivered to him as aforesaid, proceed to inquire into and adjudicate upon the value of the lands required for the purposes of the railway," &c. And also into "the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the Company." And it is argued, that this reference to the claims mentioned in the 8th section confines the arbitrator's power of inquiry and adjudication to such claims—namely, to claims made in writing. But it appears to me that this reference is made for the purpose of fixing the time when the arbitrator is to proceed in his inquiry (namely, after the expiration of the period specified in the 8th section for the delivery of such written claims), and not for the purpose of confining the arbitrator's power of inquiry to such written claims as should have been so delivered. The time of the arbitrator's entering on his inquiry is fixed by that reference; but I do not think that the subject-matter of his inquiry is thereby limited to written clauses. There are no words in the 9th section which expressly impose that limitation to his inquiry. And, considering the powers of the Company, and the manifest object of the

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M. T. 1864. Legislature to provide compensation for those parties whose lands may be taken or injuriously affected by the Company, I do not think that such a construction as would unnecessarily interfere with the attainment of that object should be adopted by implication.

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Assuming, however, that, under the 8th and 9th sections, the inquiry of the arbitrator was limited to such claims as should be made in writing, it appears to me that the conduct of the Company precludes them from now relying on that ground of objection. It is not contended for the Company that the written claim should be delivered within the time specified in the Company's notice under the 8th section, or that it would not be sufficient to deliver it to the arbitrator at the time of the inquiry. If, therefore, the objection now taken had been taken, either by the arbitrator or the Company, at the time the prosecutor made his verbal claim, it would have been in his power to remove it by furnishing a written claim. But that course was not adopted, though the Company were aware that no written claim had been made. At the meeting before the arbitrator, the only objection relied on to the prosecutor's claim for compensation was, that none of his lands had been taken by the Company—(an objection which, as I have already mentioned, is clearly untenable). And the present objection, of there being no written claim, is put forward for the first time on the argument, and was not even referred to in the affidavit to show cause. It has been urged that, before granting a *mandamus*, the Court should be satisfied that a regular demand had been made. But, in the present case, a demand had been made upon the arbitrator to adjudicate on the prosecutor's claim; which demand, though verbal, was dealt with both by the arbitrator and the Company as if it was sufficient, and was refused by the arbitrator upon an erroneous and wholly different ground.

Under these circumstances, I think the Company should not now be allowed to dispute the sufficiency of that demand, and that the *mandamus* should be granted.

HAYES, J.

I am of opinion that the conditional order should be discharged. And I have come to that opinion upon what appears to me to be a

well-established principle of *mandamus* law. This is an application to the Court to command the arbitrator to proceed to hear and determine a case. Now, the applicant must, in the first instance, show that he has done everything in his power fairly to bring the matter before the arbitrator; and that it is through the arbitrator's default, alone, that the case has not been heard. Can that be said here? I think not. What has he done up to this time? He had a conversation with the arbitrator on the occasion of his sitting in Nenagh; and told him that his lands had been injuriously affected. The arbitrator said that he would be very happy to hear his case, only that the lands did not appear on the maps and plans, and there was no consent given by the Company. Having received this intimation, the applicant ought to have proceeded to bring his case regularly before the arbitrator by sending a statement of his claim, pursuant to the 14th & 15th Vic., c. 70, s. 8. If he had done so, the Company would have had the opportunity of considering whether they would accede to or deny his claim. In case of denial, he might then have called on the arbitrator to take cognizance of his case. He has failed to put himself in a position in which we should be called upon to grant a *mandamus*.

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FITZGERALD, J.

I concur in thinking that the order should be discharged as one improvidently issued, and which would not have been granted if the Court's attention had been specifically called to the very loose statement in the prosecutor's affidavit.

I should not have said one word more, but for statements which have been made at the Bar, and some expressions which have dropped from the Bench; and I wish to state precisely the ground of my concurrence in the judgment of the Court. It appears to me that, quite irrespectively of the provisions of the statute, the ordinary rule regulating the judicial discretion of the Court makes it necessary that, when you ask for a *mandamus* to compel an officer to discharge a duty cast upon him by the law, and in respect of which he is not to be the moving party in the first instance, you must show that you have made a proper demand upon him; and

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that he has refused. The statute, whether mandatory or not, shows how a claim for compensation should be made—namely, that the party claiming compensation on account of his lands being injuriously affected, such a claim being often of a shadowy character, should make the claim in writing, specifying the lands, showing his right, and the sum claimed; and requiring the arbitrator to proceed to assess compensation upon his claim. This is the nature of the demand which the law points out. Now the affidavit of the prosecutor states “that when Mr. Fishbourne attended at Nenagh for the purpose of assessing the value of the land, and the damages sustained by the several parties from whom the land had been taken for the said railway extension, and also the injuries done to the lands injuriously affected by the execution of the works of the said branch railway, this deponent applied to him to inquire into and to assess the damages to be done to his said premises by the said Railway Company, who refused to do so, as it was not referred to him by the said Company.” There is the whole of the statement; and, after the lapse of somewhere near three years since this conversation took place, we are called upon, without a written statement of the claim made, or anything more than that verbal conversation, and after what would appear to have then been a relinquishment by the applicant of his claim to compensation before the arbitrator, to order him to discharge this duty. I think that the conditional order was improvidently issued, no proper claim having been made.

But as it appears that Mr. Fishbourne put his refusal on the specific ground that the matter had not been referred to him, and as the Company did not point out the objection then, but make it for the first time at the Bar, I think that the conditional order should be discharged without costs.

I have only to add further, that I wish to say nothing on the question whether the claimant is precluded from still making his claim, and enforcing it against the Company, although the final award of the arbitrator has been made up and enrolled.

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THE QUEEN, at the relation of
 MAURICE WILLIAM HENNESSEY,

v.

JOHN CROSTHWAITE.*

Jan. 13, 19.

QUO WARRANTO.—Information in the nature of a *quo warranto* to try by what authority the defendant John Crosthwaite claimed to use and exercise the office of Commissioner for the Glasthule ward of the township of Kingstown.

At the Sittings after Hilary Term 1863, the case was tried before the LORD CHIEF JUSTICE and a special jury, when, by consent of the parties, a special verdict was found; whereby, after stating the facts, the case was referred to the Court to decide whether or not, upon the whole matter, the defendant was or was not, at the election in question, one of the two persons who had the greatest number of votes given by persons who were by law qualified and entitled to vote at said election?

The election was held on the 15th of October 1861, when four candidates presented themselves to contest for two vacant Commissionerships. The defendant John Crosthwaite received eighty-five votes; Mr. Richard Mayne received seventy-seven votes; Mr. Gorman received seventy-five votes; and Mr. Edward Murphy received seventy-one votes. Of these votes thirty-one were recorded by females. Twenty-one females voted for Messrs. Crosthwaite and Mayne, while the remaining ten females voted for Messrs. Gorman and Murphy.

The special verdict then set forth a number of other facts, which it is not necessary to state, inasmuch as they concerned questions of minor importance which are not herein reported. The first question stated for the opinion of the Court was:—Whether or not the

Towns Improvement (Ireland) Act 1854.

Section 22 defines the qualifications of voters at the election of Town Commissioners, "Every person of full age who is the immediate lessor;" also "Every person of full age who shall have occupied as tenant or owner, or joint occupier, or shall have been the immediate lessor of any lands," &c.

Held, that women of full age were admissible to vote under this section.

Quære, whether women were eligible as Town Commissioners?

* See this case in Exchequer Chamber, *infra*.

H. T. 1864. thirty-one persons, being females, named in the special verdict,
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 THE QUEEN, were entitled, as females, to vote at the said election, under and
 v. pursuant to the provisions of the Towns Improvement (Ireland)
 CROSTH- Act 1854, and other the Acts incorporated therewith?
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And it was agreed that judgment should be entered for the relator, with costs, if the Court should be of opinion that the defendant was not one of the two persons who had the greatest number of votes given by persons who were by law qualified and entitled to vote at said election; but that, if the opinion of the Court was otherwise, then judgment should be entered with costs for the defendant.

It was further agreed that either party might bring error upon the judgment of the Court upon this special case.

Coffey (with whom were Serjeant *Armstrong*, and *J. T. Ball*), for the relator, opened the argument upon the special case.

The qualifications of voters are specified in the 17 & 18 *Vic.*, c. 103, s. 22. By section 1 the word "householder" is defined to be "a *male* occupier of a dwelling-house," &c.; "and words importing the masculine gender (except only the word *male*) shall include females." "Occupier" includes an "immediate lessor," but not "a lodger." The defendant contends that females have a right to vote, because they are not expressly disqualified from voting, and because they are included in the words "lessor" and "occupier." But the exercise of such a right is unsuitable to females, and to give it them it will be necessary to give to different parts of the Act inconsistent and repugnant constructions. In order to bring a township under the Act, an application must be made (section 4) to the Lord Lieutenant by twenty-one "householders," that is to say by twenty-one *male* persons. Under section 6 and schedule A, the meeting subsequently convened is to consist only of *male* persons; and by section 7, certain classes of persons are given a right to vote "at any *such* meeting convened as aforesaid;" that is to say, at any meeting of *male* persons convened, &c. Sections 7 and 22 are almost identical in terms, so that, leaving the form in schedule A out of consideration, females would, if the defendant's

argument be well founded, have a right to vote at the preliminary meeting as well as at the election of Commissioners. And the argument must be pushed to this extent, that females may be Commissioners under the words "any householder *or occupier*"—(section 25). But the office of Commissioner is unsuited to their sex. It might happen that all the Commissioners of a township would be females, and then the statute would become inoperative in so far as it enables one of the Commissioners to become a Justice of the Peace—(section 29). One of the duties of the Commissioners is to supervise the sanitary condition of the township, and females could not do so. Therefore the objects and construction of the Act show that females have not a right to vote. Even though females can be brought within the express phraseology of the Act, they have not therefore a right to vote. For instance, the word "people" in the 8 H. 6 (*Eng.*), c. 7, would include females, but they had not the Parliamentary franchise: 4 *Co. Inst.*, p. 5. No doubt, a woman has been appointed overseer of the poor: *The King v. Stubbs* (a). But that decision rested on the necessity of the case (p. 406). In *Olive v. Ingram* (b) a woman was allowed to hold the office of sexton, and to vote for the candidates, because the office did *not concern the public*. In *Anonymous* (c) a woman was permitted to be governor of a workhouse, though the office was not suited to her sex. The reason, however, was, that she might act by deputy.—[FITZGERALD, J. The Court did not assign that fact as a *reason* for their decision.]—But it is the fair inference from the language of the Court, especially remembering the reference to Lady Braughton having been the keeper of a gate-house: *Rex v. Braughton* (d); but the Court in that case held that she could not be more than a deputy, as such a franchise could not be leased. There is no instance of a female having been appointed to an office which requires the exercise of discretion; and, whenever they have been appointed to offices of power and trust, it was because a deputy might be appointed, or because the public necessity required the appointment. Though females may vote for poor-law guar-

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(a) 2 T. R. 395.

(b) 2 Str. 1114.

(c) 2 Lord Ray. 1014.

(d) 3 Keble, 32.

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dians, yet they have not to appear personally at the election, but vote by transmitted papers; and all poor-law guardians must, under the Act, be males.

Heron (with whom were *Whiteside*, *Macdonogh*, and *Jellett*),
 contra.

It is a principle that females have a right to vote for all officers to whom is intrusted the local management of local property, as, for poor-law guardians; and nothing but an express statutable disqualification can take away the right. The 22nd section of the 17 & 18 *Vic.*, c. 103, read by the aid of the interpretation clause, gives females the right to vote at the election of Commissioners, though they are expressly excluded by sections 4, 6, and 7 from voting at the preliminary meetings. Section 25 must be construed by the rule *noscitur a sociis*, and it is not necessary to argue that females may be Commissioners. The 8 *H.* 6, c. 7, expressly excludes women, because its title is, "What sort of *men* shall be choosers," &c.; besides, though the word "people" is used, yet they are described in the Norman French by the pronoun in the masculine gender—*e. g.*, "everyone" is "*chescun*." Therefore the first and last Act (8 *H.* 6, c. 7, and 2 *W.* 4, c. 45), limiting the Parliamentary franchise in terms, excludes females.—[FITZGERALD, J. So does the Municipal Corporation Act.]—The case of *The King v. Stubbs* (a) decided that a woman might be an overseer of the poor, she being a substantial householder under 43 *Eliz.*, c. 2. So, the 1 & 2 *Vic.*, c. 56, ss. 80, 81, gives the qualification to vote to *every rate-payer*. So, a *femme sole*, liable to church rates, may vote for churchwardens: *Finlay's Office of Churchwardens*, p. 25. So, at vestries, *every parishioner* has a right to vote under 4 & 5 *W.* 4, c. 90, s. 43. So, females have a right to vote for sextons: 14 *Vin. Abr.*, tit. *Feme*, par. 7; and in par. 3, "Sisters of an hospital incorporated may choose a master by custom together with the brothers." Also (at par. 4), a woman may be a commissioner of sewers, and (p. 6) a governor of a workhouse. "All persons paying scot and lot" had a right to vote for a sexton:

(a) 2 T. R. 395.

Olive v. Ingram (a).—[HAYES, J. That case is also very fully reported in the life of Lee, C. J., in *Lord Campbell's Lives of the Chief Justices of England*.]—The right to vote for a dispensary doctor was not confined to males: *The Queen v. O'Hara* (b). And females are disqualified from being jurors only by the express words of the 3 & 4 W. 4, c. 91. Nor is there anything unsuitable to a woman's sex in voting at an election for a Town Commissioner, for she has only to hand in a paper, and, if required, take an oath: 10 & 11 Vic., c. 16 s. 28.

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Ball, in reply.

In *The Queen v. O'Hara* the vote was given by proxy, and under a bye-law. The 7 H. 4, c. 15, as well as the 8 H. 6, c. 7, regulated the right to vote at elections for members of Parliament. But neither of those Acts created the Parliament, as the 17 & 18 Vic., c. 103, created Towns Commissioners. Females are denied the right to vote for members of Parliament, because they are so subject to influence; and there are but three cases in which they can hold office: first, where they do so in the exercise of an hereditary right as in the instance of the Sheriff of Appelby; secondly, where they can act by deputy; thirdly, where they are only to do ministerial acts.

Cur. adv. vult.

LEFROY, C. J.

This case comes before the Court upon a question raised on the construction of the Towns Improvement Act (17 & 18 Vic., c. 103). The question arises upon the validity of an election, which took place under that Act, for appointing Commissioners to carry it into execution at Kingstown. The precise point that we have to decide, touching the validity of the election in question, is, whether females are entitled to vote for the election of Town Commissioners under this Act? It will be found, I think, in this case, as has been said in other cases by very eminent Judges, that the soundest construction of the Act—or, as I would rather say, of the document, whether

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(a) 7 Mod. Rep. 263.
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(b) 2 Ir. Com. Law Rep. 391, note.
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it be a deed, or a will, or a statute,—will be made by what appears within the four corners of the instrument; and, accordingly, we have attentively considered the various provisions of this Act, in reference to the particular question which we have to decide; and we think it will be found that the rule which I have laid down for construing a statute or document, and which has been sanctioned by the highest authority, will be fortified, in respect of its usefulness and correctness, particularly in this instance; for it will be found that the conclusion at which we have arrived will be fortified not only by the affirmative clauses of the Act, but also by its negative clauses,—that is to say, not only by what we find positively inserted in some of the provisions, and in some parts of the provisions of the Act, but also equally by what we find has been omitted from clauses, or omitted from parts of clauses, in reference to the particular point upon which we have to come to a decision, namely, in reference to the qualification of voters for Town Commissioners.

One main ground of the prosecutor's argument has been, that we cannot arrive at the conclusion that females are entitled to vote for Town Commissioners, because the inference would follow that they might also themselves be Town Commissioners; and that the absurdities which would attend such a conclusion as that would necessarily attach both to the qualification to be a Commissioner, and to the qualification to vote for Commissioners. That is no doubt a strong ground of argument; but, adverting to the title of the Act, and to the duties to be performed by the Town Commissioners, I may say that nothing can be more distinct, in respect to the provisions of the Act, than the difference between the qualification to be a Town Commissioner and the qualification to vote for a Town Commissioner. The qualification to be a Town Commissioner is the qualification to carry out the duties enjoined by the Act, and to superintend the performance of those duties. The very title of the Act shows what its objects were, namely, to make "better provision for the paving, lighting, draining, cleansing, supplying with water, and regulation of the several towns in Ireland." Now, to be qualified to superintend, and direct, and manage, and contract, with

reference to these several subject-matters, is quite evidently a sort of qualification which is just as inappropriate to the character of females, and the performance of such duties by them, it would be as unreasonable to expect, as it is reasonable and appropriate that a person who has property which is liable to be taxed, and in reference to which it is important that these several duties should be effectually carried out,—I say nothing can be more appropriate than that the persons interested in the discharge of those duties should have a share in the election of those who are to carry them out. In truth, it is no more than saying that a female who is in any manner interested in property should have a right to appoint an agent to act for her. There is no absurdity in that. To exclude her from appointing an agent to manage her own property, would be as great an absurdity as to say that she herself would be qualified to perform all the sundry and various duties which she might properly discharge through an agent, but which she herself is not qualified to perform. That consideration therefore really puts an end to all that line of argument which has been drawn from the nature of the qualifications of Town Commissioners, as attempted to be confounded with the qualification to vote for Town Commissioners. The distinction is quite obvious; and, so far as any argument can arise upon a compromise of the duties to be performed in the one case, and the duties to be performed in the other, instead of being an argument in support of the object for which it was pressed, it is really an argument that cuts the other way.

I therefore pass now from a consideration of the title of the Act, which though in general it goes but a short way, yet does go some way towards the construction of the Act. I pass on to consider the various clauses of the Act itself, and shall call attention to them severally. I will take them in reference to the effect that they might have, negatively or affirmatively,—that is, in favour of or against the argument on behalf of the claimant in this case.

I first call attention to the interpretation clause of the Act; and it is important that the definition there given of the word "householder" should be adverted to; for the term "householder" is interpreted to mean "a *male* occupier of a dwelling-house" within

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the prescribed boundaries. Therefore, wherever in the Act we meet with the word "householder," it carries with it a meaning perfectly conclusive to show that females are excluded from every duty which can be performed only by a householder; who, according to the interpretation clause, must be a "male."

The next part of the Act to which I call attention is its fourth section. Upon an application made by twenty-one householders of any town, rated to the relief of the poor at £8, the Lord Lieutenant may order the Mayor or Chief Magistrate to convene a meeting *to consider the adoption* of the Act in that town. It is perfectly plain therefore that, if the Act ended there, none but males could be amongst the persons who were to petition the Lord Lieutenant for liberty to adopt this Act; and the householders who make such an application to the Lord Lieutenant must be males.

When the Lord Lieutenant has granted permission for the adoption of the Act, then comes a provision with reference to the persons who are to be summoned to the meeting which the Chief Magistrate is to convene. Notice of such meeting is to be given according to the provisions of section 6, and in the form given in schedule A, which describes who shall receive notice of such meeting. The persons to be summoned are described as "the rated *occupiers* and *lessors* following;" nothing is said there of "*householders*." If there had, the very word carried with it the necessity of the summons being to householders—that is, *male* persons only. But then come the following classes of persons, viz., "every male "person of full age who shall have occupied as tenant or owner, "or shall have been the immediate lessor" (rated for such premises to the relief of the poor) "of any lands, tenements or premises," within the prescribed boundaries. Now a great argument was founded upon the fact that the persons who are to receive the notice are described as "*male* persons;" and no doubt, *prima facie*, I, for one, was much struck with the argument founded upon that, that it would follow that the persons who are to vote should be the persons who were to be summoned; and *vice versa*, that the persons to be summoned were to be the persons to vote. But we shall find, as we go on, a perfect distinction made in plain terms between those

to whom notice should be given with a view to attend there, and the qualification to vote when the meeting should be assembled; and if there could not be found an answer to the argument arising from the persons who are to be summoned, the inference drawn from it would be and ought to be conclusive.

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It is remarkable that, with respect to the summoning, the case is not left upon the general term "persons," but "such *male* persons;" showing clearly the understanding of the Legislature that the word "person" would not by itself indicate sex; for they have qualified it by the additional term "male," so as to leave it beyond a doubt that, according to the apprehension of the Legislature, it required a term to confine the word "person" to one sex or the other.

Having disposed of the question who were to be entitled to have a notice to be summoned, we now proceed to the 7th section, which gives the qualification of persons entitled to be admitted, and to vote at that meeting. After specifying that the persons hereinafter mentioned shall be the persons entitled to be admitted, and to vote thereat, how are they described? Thus—"that is to say, *every person of full age* who is the immediate lessor of lands, tenements, "and hereditaments within such town." There is here an omission of the word "male," which would limit the qualification for the right to vote, leaving it open under the word "person;" and where the Legislature meant to impose any restriction upon the word "person," they have done so. Here it is "every person of full age," without any restriction in point of sex; clearly indicating that, where the Legislature meant to restrict the meaning of the general term "person," they did so expressly.

Well, then, the right to be admitted and to vote at such meeting is given in the terms which I have stated; and therefore, *ex vi termini*, includes every person not restricted who could be embraced under the general term "person," so qualified as is set forth in that section.

As to the remaining classes entitled to be present and to vote at that meeting, "also every person of full age who shall have occupied as tenant or owner." There, again, a specific restriction is imposed, not as to sex, but as to age; thus affording an inference, from the

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maxim expressio unius est exclusio alterius, that the Legislature, having expressly imposed one restriction, did not mean to leave it to implication that any other should be imposed. By section 21, after approbation by the Lord Lieutenant of the adoption of the Act, a meeting is to be convened for the election of Commissioners; and by section 22 is defined the qualification of persons who shall be entitled to vote for Commissioners; and in fact it is this section which specifically applies to the very point which we have to decide, and to the qualification of persons entitled to vote at the first and every future election of Commissioners. The voters are described as, "such persons as are next hereinafter mentioned shall be admitted and entitled to vote, and *no other person whatsoever*." Now it is remarkable that they were not ordered to be summoned; and that was the great argument; but when we come to the meeting which is to be convened for the election of Commissioners, it is enacted that, at the first *and* every other meeting for the same purpose, the persons admitted and entitled to vote shall be qualified as follows: "every person of full age"—not a word about sex—"who is the immediate lessor of lands, tenements, and hereditaments," of the value of £50; "and also every person of full age "who shall have occupied as tenant or owner, or joint occupier, or shall have been the immediate lessor," rated to a certain amount. Upon that section depended in fact the case which is now before us. We must decide upon its interpretation, not only by the affirmative words where a qualification was designed by the Legislature, but by the omission of words which would be essential to disentitle the claimants here. We find a qualification which is not now the subject in question introduced; and the omission of a qualification which would be the essential one upon which we are to inquire. We think that, both on the affirmative and the negative evidence, the claimants who now complain of the non-admission of their votes were entitled to be admitted, and to vote for the election of Commissioners.

I have thus gone through the sections, and the portions of sections, which bear upon the question; and I have not omitted to look carefully into all the other sections; and I could find nothing what-

ever to shake the conclusion to which we have come, that, upon the true construction of the Act itself, it appears to us that females are entitled to vote for Commissioners.

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O'BRIEN, J.

I concur in the judgment of the Court, that females are not disqualified from voting at the election of Commissioners under the "The Towns Improvement (Ireland) Act 1854." It appears to me that, under the provisions of that statute (construed according to the ordinary and well-settled rules of construction), females are not only not excluded from voting at such elections, but that their right to do so is distinctly recognised and established. One ground of objection (already referred to by my LORD CHIEF JUSTICE) has been much pressed by the relator's Counsel, namely, that if we give such a construction to the statute as would be requisite in order to warrant the conclusion that females are entitled under it to vote at the election of Commissioners, a similar process of reasoning would also lead to the conclusion that females would be entitled to be themselves elected as Commissioners; and Counsel contend that this result would be attended with such manifest inconvenience, and would be so repugnant to the policy of the law, that we should not adopt a construction which would lead to it, even though upon the terms of the Act itself we should be otherwise disposed to do so. In my opinion, however, a careful examination of some provisions of the statute, to which I shall presently refer, will show that such a result would not follow from our decision; and that, with regard to the distinction between males and females, the provisions for the qualifications of persons entitled to vote at the election of Commissioners are different from those as to the qualifications of persons entitled to be elected as Commissioners; and that there would be no inconsistency in holding that females were entitled to vote at the election of Commissioners, but were not entitled to hold that office themselves. It will be also seen that in some of the sections which regulate other meetings and proceedings under the Act, words are used by which females are clearly excluded from taking part therein; but that in the sections relating to the election of Com-

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missioners, those words are omitted; and it appears to me that this circumstance of using in the former sections, but omitting from the latter, the words excluding females, shows that the Legislature, in using such different language, contemplated different results, and did not intend that females should be excluded from proceedings as to which, instead of such terms of exclusion, other terms were used capable of including females as well as males.

The first section of the Act to which I shall refer is the interpretation clause (section 1). It enacts that the words in the Act should have the meaning assigned to them by that section, "unless there be something in the subject or context repugnant to such construction." And in a subsequent part that the word "householder" shall mean "a male occupier" of a dwelling-house, lands, &c.; and that the word "occupier" shall extend to and include an immediate lessor, in certain cases, but not a lodger; and in the concluding part of the section it declares that "words importing the masculine gender (except only the word 'male') shall include females." It is clear therefore from this section that the word "householder," when used in the Act, should be construed as confined entirely to "males," and as excluding "females;" and that, on the other hand, the word "occupier" should be construed to mean *females* as well as *males*, except there be something in the subject or context repugnant to such construction. In subsequent sections of the Act *four* different sets of provisions are contained, defining the qualifications requisite to be possessed by parties for various purposes, viz., first, by the persons entitled to apply for the Act being put in force; secondly, by the persons entitled to vote at the preliminary meeting convened in pursuance of such application; thirdly, by those who are entitled to vote at the election of Commissioners; and, fourthly, by those who are eligible to be elected as Commissioners. Thus, with respect to the original application for putting the Act in force, the fourth section provides that it should be made by twenty-one or more "householders," rated at £8 and upwards; and, having regard to the definition of the word "householder" contained in the interpretation clause, the effect of this provision is, that the power of making the application is

confined to *male* occupiers, and is not given to *females*. With respect to the preliminary meeting consequent on such application, section 6 provides that it should be convened by notice, in the form given in schedule A to the Act. This section should therefore be read in connection with that form; and, by referring to it, it will be seen that the meeting to be convened is one of *male* persons only, who should be rated occupiers or lessors. The seventh section then provides for the requisite qualifications as to property, rating, and residence of persons entitled to vote at such meeting; and though it declares that "*every person of full age*" possessing those qualifications shall be entitled to vote at the meeting, and does not use any word that would of itself exclude females from such right, it is in my opinion clear that, having regard to the sixth section, the right of voting is confined by the Act to *males*, inasmuch as under the sixth section, and the form in schedule A, the meeting convened was to be one of *male* persons only. It appears to me therefore that, by the terms of the Act itself, and independent of any consideration of policy or expedience, *female* occupiers or lessors, though possessing the requisite qualifications of property, rating and residence, are excluded from the right of making the original application, or of voting at the preliminary meeting. When, however, we come to the sections which provide for the election of Commissioners, the meeting to be called for that purpose, and the persons entitled to vote at it, the language of the statute is different. The 21st section provides that, for the purpose of such election, a meeting "*of the rated occupiers*" (qualified as afterwards mentioned, with respect to rating, residence, &c.) should be convened, and notice given of it. No form of notice is given or referred to; and there is nothing in this section to confine the meeting for such election to a meeting of "*male occupiers*," as there is in the sixth section and schedule A, with respect to the preliminary meeting. The 22nd section then provides that, at the meeting for the election of Commissioners "such persons as next hereinafter mentioned shall be admitted and entitled to vote, and no other person whatsoever." And it then defines the qualification as to rating and residence requisite to be possessed by

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immediate lessors or occupiers, for the purpose of so voting. In this section also no word is used that would confine the right of voting to *males*, or exclude *females* from it; but the word "person" is used throughout—a term sufficiently comprehensive of itself to include *females* as well as *males*; and the only word in it denoting the masculine gender is the word "him," which, according to the interpretation clause, is to be construed as including females. This section omits the word "householder," which is expressly confined by the interpretation clause to "*male occupiers*," and uses the words "*occupiers and immediate lessors*," which are not so confined, but which would of themselves include females as well as males; although parties declared by that section entitled to vote as occupiers or immediate lessors would, under the interpretation clause, be properly described as "householders," if by that clause the word "householder" was not expressly confined to males. I think therefore that, from the language of this section, contrasted with that of the preceding sections, we may fairly infer the intention of the Legislature to have been that the right of voting for Commissioners should not be confined to male occupiers or lessors, but might be exercised by females, if in other respects duly qualified; and I see nothing in the context repugnant to such a construction, or that would warrant our introducing into the Act words which would exclude them.

With respect to the argument of the relator's Counsel, that if we held females entitled, under the Act, to vote at the election of Commissioners, we should also hold them eligible to fill that office, I have already observed that, as far as regards the distinction of sex, the provisions as to the persons entitled to vote for Commissioners are different from those which define what persons are eligible to that office. The latter provisions are contained in the 25th section—[reads it].—Now, although the word *person* is used in the early part of this section as to immediate lessors, and would of itself include females as well as males, yet in a subsequent part of the section the words "householder or occupier" occur. And it would, in my opinion, be repugnant to the context to hold that, although the word "householder" is, by the interpretation

clause, expressly confined to *male occupiers*, yet that the word "occupier" used in immediate connection with it, or the word "person" used in the preceding part of the section, should be construed *in that section* as including both males and females. I think therefore, that, from the different language used in this section as contrasted with that of the 22nd, there is no inconsistency of construction in holding that, although under the 22nd section females are entitled to vote for Commissioners, they are not under the 25th section entitled to hold that office. It appears to me, indeed (though it may be not necessary to decide the question), that the statute itself sufficiently indicates the intention of the Legislature that females should not be eligible to the office. And that having regard to the various duties of the office, which could not, in accordance with usage or propriety, be performed by females, it would be inconsistent with the policy and object of the statute to hold them entitled to it, even supposing that the words of the statute (according to the meaning assigned by the interpretation clause) would give it to them. But with respect to the right of females to vote at the election of Commissioners, I do not see that the exercise of such a right would be at all repugnant to the policy of the law, or attended with any inconvenience. Counsel for the relator have indeed contended that, if females be ineligible to hold the office of Commissioners (which was conceded by defendant's Counsel during the argument), they should for that reason be excluded from the right of voting at the election of Commissioners. And Counsel rely on an opinion expressed by Chapple, J., in *Olive v. Ingram* (a), that where women could not hold an office they ought not to choose it. But that opinion, not being requisite for the decision of the case, may be regarded as extra-judicial, and is not a binding authority. And we have a strong instance of a contrary rule being acted on under the Poor-law Acts. It is clear that females are ineligible to hold the office of guardians under those Acts; and yet for upwards of twenty years the right to vote at the election of poor-law guardians has been repeatedly exercised by females without dispute. The first Poor-law Act (1 & 2 Vic.,

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(a) 7 Mod. 268.

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c. 56, ss. 81, 82) contains a definition of the word "ratepayer," and gives to all *ratepayers* the right to vote at the election of guardians. The word "him," used in those sections in reference to voters and ratepayers, would of itself import that the right was confined to *males*, but for the glossary or interpretation clause (section 124), which declares that words in the statute importing the masculine gender should include females as well as males, "except where the context excludes such construction." It appears to me that the same rule of construction which under the Poor-law Acts would give females the right of voting for guardians, would also give them, under the Acts now in question, the right of voting for the election of Commissioners. And with respect to the argument grounded on the general policy of the law, no reason has been assigned why the exercise of the latter right by females should be considered more objectionable than that of the former. It is notorious that the right of voting for guardians has been constantly exercised by females since the passing of the Poor-law Acts; and I am not aware of any case in which it has been disputed, though it would have been competent for any ratepayer to have raised the question.

Counsel for the relator have also relied on the fact that females are not entitled to vote at the election of Town Councillors in corporate towns, or at the election of members of Parliament. But by referring to the statutes regulating the rights of persons to vote at such elections, it will be seen that the words of the statutes expressly confine those rights to males. The Municipal Act (3 & 4 *Vic.*, c. 108, s. 30), which defines the qualifications of burgesses, uses the words "every *man* of full age." The Reform Act (2 & 3 *W.* 4, c. 88, s. 5) uses the words "every male person of full age." And similar words are used in the subsequent Act, 13 & 14 *Vic.*, c. 69, for regulating the electoral franchise in counties and cities. It appears, therefore, that in those cases the intention of the Legislature to exclude females was manifested by the use of words which expressly confined the right to males, whereas in the Acts now before us the terms which define the qualifications for the right are such as, according to the interpretation clause, include females as well as males.

The 28th section of the Commissioners Clauses Act 1847 (which regulates the proceedings at the election of Commissioners, and is incorporated in the Towns Improvement Act 1854) has also been referred to by relator's Counsel. In that section the words "he" and "his" are used with reference to the voters. And Counsel rely on this as indicating the intention of the Legislature that the right of voting should be confined to males; but on reference to the interpretation clause of that Act, it will be seen that those words "he" and "his" are to be construed as including both males and females. And the form of voting-paper given in schedule A, referred to in that section, contains no words confining that right to males such as are contained in the schedule referred to in the 6th section of the Towns Improvement Act of 1854, and on which I have already observed.

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It has been also urged, that, since the 9 G. 4, c. 82, which provides for the lighting, cleansing and watching of cities and towns in Ireland, there has been no instance of females voting at the election of Commissioners under that Act. But even if there was a decision against their right to do so, it would not bind us in the present case, because the provisions and language of that Act, with respect to the qualifications of voters at such elections, are different from those in the Towns Improvement Act of 1854, with respect to the election of Commissioners thereunder.

On these several grounds I concur in the judgment which has been pronounced.

HAYES, J.

There is nothing in the principles of the Common Law, or in the enactments of any statute, which excludes females from voting for Town Commissioners. With respect to the general right to vote, everything has been said that is necessary, and I concur in it. When we look at the nature of the duties of the office, I do not find anything which in the performance of those duties involves the necessity of a female outraging the modesty and retiring disposition which so well become her sex. All that she has to do is to appear before the returning officer; answer a couple of questions; and

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hand in a paper. But what is the duty to be done by the Commissioners for whom she votes? They are intrusted with the disposal of property to a considerable amount, to be employed in carrying into execution all or some of the several purposes mentioned in the preamble to the Act (17 & 18 *Vic.*, c. 103); and this property is to be realised by contributions levied out of the pockets as well of females as of males.

Upon the general principle that there shall be no taxation without representation, and that it is not inconsistent with justice and common sense that females should have a voice in the election of persons who are to manage the property which by the law of the land females are allowed to acquire and to hold, I think that the first question in the special verdict should be answered in favour of the claimants.

FITZGERALD, J.

Concurring as I do in the result at which the Court has arrived, I only wish to add that I am not to be taken as concurring in any expression indicating an opinion that ladies are not entitled to sit as Town Commissioners, if the electors choose to elect them.

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Nov. 3, 4.

JAMES DEVINE and PATRICK PENTONY

v.

M. V. 1864.
Dec. 13.

THE LONDON & NORTH WESTERN RAILWAY CO.*

Plaint contained two counts in contract for non-delivery of goods; also

THE summons and plaint in this action contained four counts, in the first two of which the defendants, as carriers of bullocks for hire from Dublin to Huntingdon, were sued for breaches of contract.

counts for trover and for detainee. Defendant traversed contracts alleged in the two first counts, and paid £14. 2s. 6d. into Court on the other two. Issues were taken on the two first counts, and as to the sufficiency of money paid into Court. Verdict for plaintiff upon one of the counts in contract, with £14. 5s. damages, but for defendant on the other counts. The Taxing-master allowed only half plaintiff's costs.

Held (by LEPROY, C. J., and FITZGERALD, J.), affirming the Master's decision, that the plaintiff had recovered less than £20 in an action of contract.

Held (by O'BRIEN and HAYES, JJ.), that all the counts should be considered as one action, and therefore that defendant was entitled to full costs.

* Before the Full Court.

The contract stated in the first count was to carry twenty-four bullocks of the plaintiffs from Dublin to Huntingdon, and there deliver them for the plaintiffs, in such time that the bullocks could reasonably be at St. Ives, near Huntingdon, a reasonable time before a certain market which was to be held at St. Ives at about 8 a.m. on January 11th, 1864.

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The contract set forth in the second count was to carry twenty-four bullocks from Dublin to Huntingdon, and there deliver them for the plaintiffs within a reasonable time.

The third count claimed damages for the conversion by the defendants to their own use; and the fourth count was for the detention, by the defendants, of one bullock of the plaintiffs.

Prayer for judgment:—On the first and second counts £50; on the third count £20; and on the fourth count “the delivery of the said bullock, with £20 damages for its detention.”

To the first and second counts the defendants pleaded that the bullocks were not delivered to or received by them upon the terms and conditions mentioned.

Further defence to the first count, that the bullocks were delivered at Huntingdon a reasonable time before the market.

Further defence to the second count, that the bullocks were delivered at Huntingdon within a reasonable time.

As to the third and fourth counts, the defendants, averring that they related to the same bullock, brought into Court the sum of £14. 2s. 6d. in satisfaction of the cause or causes of action in those two counts.

The case was tried in Dublin on the 22nd of June 1864, before the LORD CHIEF JUSTICE and a special jury.

No evidence was offered by the plaintiffs on the third paragraph.

The jury found a verdict for the defendants on the first, third, and fourth counts, and for the plaintiffs on the second count; and assessed the plaintiff's damages at £14. 5s. 0d. in addition to the sum lodged in Court.

On taxation, the Taxing-officer allowed only half costs to the plaintiffs, on whose behalf—

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M. O'Donnell (with whom was *Palles*) now moved the Court to direct the Taxing-officer to review his taxation; on the grounds that the present action was not one of those in which only half costs are allowed to plaintiffs by the Common Law Procedure Act (*Ir.*) 1853, s. 243; and that the sum recovered in this action was not less than £20. The plaintiffs recovered by force of this action £28. 7s. 6d., and are therefore entitled to full costs: *Hughes v. Guinness* (a); *O'Rorke v. M'Donnell* (b); *Parr v. Lillicrap* (c).

Serjeant *Armstrong* (and *Boyd*), contra.

In the former cases it was held that the cause of action on which the sum was recovered by verdict was identical with that in respect of which money had been lodged in Court; that therefore these two sums should be added together; and that in an action of contract there was not any difference between lodgment and payment into Court. But in the present case the defendants have not, in the counts in contract, recovered more than £20. The sum lodged in Court had no application to these counts. The two latter counts must be regarded as quite distinct from the first two: *Blackmore v. Higgs* (d). Erle, C. J. [p. 793], said:—"But I take the rule to be this, that, where there are two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are for the purposes of costs to be treated as being as distinct as if there had been two separate actions. I think the plaintiffs are to be in no better position by joining the whole in one action than they would have been in if they had brought two."—[O'BRIEN, J. If the plaintiffs had recovered £17 on the counts in contract, and £4 on those in tort, and that there was no lodgment in Court, do you say that then also they would have been entitled to only half costs?—Yes.—[LEFROY, C. J. The argument struck me very strongly, because the principle of reciprocity would be destroyed. The plaintiff might choose how to bring his action, and the defendant would have no

(a) 4 Ir. Com. Law Rep. 314. (b) 13 Ir. Com. Law Rep. App., 8.

(c) 1 H. & Colt, 615.

(d) 15 C. B., N. S. 790; S. C., 10 Jur., N. S. 703.

choice at all.]—The prayer for judgment shows that the causes of action sued upon are distinct and separate, so that the rule laid down by Erle, C. J., applies whether the action was in contract or in tort, or in both. If, therefore, it was possible to deem the detainee count as one of contract, still, the counts being founded on totally distinct contracts, and the sum of £20 not having been recovered on any *one* of them, the plaintiffs cannot obtain more than half costs; otherwise they might, by joining two separate causes of action in one plaint, place themselves in a position better than that which they would occupy if they had sued in distinct writs. Counsel also cited *Danby v. Lambe* (a).

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Palles, in reply.

The Common Law Procedure Amendment Act (*Ir.*) 1853, s. 60, regulates the mode in which costs are to be taxed in respect of matters upon which parties succeed in distinct issues; and the 78th section regulates the mode of taxation when money has been lodged in Court. When these provisions have been complied with, the question remains—at what rate are the other costs to be taxed? From the general enactment which gives a plaintiff his full costs in an action of this kind there are only two exceptions—namely, actions of contract in which £20 has not been recovered; and actions disconnected with contract in which the plaintiff has not recovered upwards of £5. These two classes of cases might be taken to be exhaustive of personal actions. But supposing the existence of a third class of cases which are neither actions of contract, nor actions wholly disconnected with contract, then the defendant here fails to bring himself within either of the two provisos in the 243rd section, which alone can deprive the plaintiffs of their costs. Assuming, however, that these two provisos exhaust every species of personal action, then the defendant must choose between them. If this is an action of contract, the plaintiffs have recovered £20, so that they are not deprived by the first proviso of their costs. If it is an action disconnected with contract, the plaintiffs have recovered upwards of £5, and therefore the

(a) 11 C. B., N. S. 426,

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second proviso does not reduce the plaintiff's costs to one-half. The sum lodged in Court is included in the amount recovered in the action: *Hughes v. Guinness* (a); *O'Rorke v. M'Donnell* (b): and the whole sum is above £20.

But the defendants say this is an action partly in contract and partly in tort, and that the plaintiffs must show that they have recovered £20 on the contract, and upwards of £5 in respect of the tort. That argument introduces into the 243rd section two words which would make it wholly different from what the Legislature intended. That section does not contain the phrase "cause of action," which was used in the Act upon which *Blackmore v. Higgs* is a decision. The Common Law Procedure Act (*Ir.*) 1853, s. 54, enables a plaintiff to combine in one summons and plead several causes of action, and provides (sec. 8) that every personal action shall be commenced by a writ of summons and plead, personal actions having been defined in sections 5 and 6. Therefore the word "action," in section 243, means all the causes of action stated in the plead; otherwise the result would be pernicious. Take the case of a landlord suing his tenant in a single plead for thirty-nine distinct gales of rent of £19 each. There would be thirty-nine distinct and separate causes of action; and is it to be said that the landlord, who recovered upwards of £500, is to get only half costs because the word "action," in the 243rd section, should be read "cause of action"? The exposition given in the two cited cases of that section shows that its policy was to prevent vexatious actions for small sums being brought in the Superior Courts. What greater vexation is there in bringing a single action for a number of, say, promissory notes, amounting altogether to £400, than there would be in bringing an action upon a single contract for £400? It is said that full costs cannot be given to a plaintiff unless it can be shown that a particular amount of money has been obtained upon some single, isolated cause of action. But the LORD CHIEF JUSTICE rightly observed that this would enable the plaintiff to choose his cause of action. He might sue upon separate contracts for different deliveries, or sue in the

(a) 4 *Ir. Com. Law Rep.* 314. (b) 13 *Ir. Com. Law Rep.*, App. 8.

same way for goods sold and delivered; each contract being for a sum less than £20 would enable the plaintiff to choose his cause of action.—[LEFROY, C. J. The Act allows actions, whether *ex delicto* or *ex contractu*, to be all jumbled together in one summons and plaint; but in respect to costs the Legislature made a distinction between them.]—That is my argument. If the action be *ex delicto* then the sum to be recovered is above £5, so that the plaintiffs are entitled to get full costs; and if the action be *ex contractu* then we have recovered £20, and should get full costs.—[FITZGERALD, J. If the action *ex delicto* on the last two counts stood alone, could you say that the plaintiffs had recovered anything?—Yes.—[FITZGERALD, J. And yet the defendant would have had a judgment, and be entitled to full costs.]—Then the plaintiffs could not in any event get full costs, because under the 78th section the plaintiffs would not get their general costs in the case.—[FITZGERALD, J. Which shows that the plaintiffs have in that action *ex delicto* recovered nothing.]—Not so, but it shows that the plaintiffs have, *by judgment* in that action, recovered nothing. In *O'Rorke v. M'Donnell (a)* the LORD CHIEF JUSTICE said that the object of the Legislature was to prevent parties harrassing their adversaries. That decision amounts to this, that recovery in the action means not recovery *by judgment*, but by force of the action, whether by lodgment or otherwise. Therefore if the action was confined to the third and fourth counts, I admit, in answer to the question of FITZGERALD, J., that the plaintiffs would not recover full costs, because the 78th section interferes, not with the *rate* of costs, but with the *right* to costs, of which right it deprives the plaintiffs. But the 243rd section, which regulates the *rate* of costs, is left untouched.

Further, this is an action of contract in which upwards of £20 has been recovered by the plaintiffs: *Danby v. Lambe (b)*. The action of detinue is not an action independent of contract. On the contrary, it is an action of contract. Erle, C. J., says that detinue is clearly in form an action *ex contractu*. The Common Law Procedure Amendment Act (*Ir.*) 1853, s. 6, recognises that.

(a) 13 Ir. Com. Law Rep., App. 8.

(b) 11 C. B., N. S. 426.

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The case of *Blackmore v. Higgs* (a) is distinguishable. That was an action for breaking and entering the plaintiff's shop, and assaulting the plaintiff's wife. A case involving a question of title could not be brought in the County Court. "Cause of action" is the phrase used in the prohibitory Act; but the assault on the wife constituted a good cause of action in trespass in the County Court. But the other cause of action, which could not have been entertained by the County Court, was *bad*; and therefore they had not any cause of action which could not have been determined in the County Court. Costs were allowed by Judge's order to the plaintiff, on the ground that the cause of action was one which could not have been entered in a County Court. A motion was made to rescind the Judge's order; and the Court held that that cause of action *which the plaintiff had at the time when he brought the action* was within the jurisdiction of the County Court, and could not be taken out of it by the addition of an unfounded claim of title to land. But it is said that the plaintiffs here are to lose their full costs, because they did not recover by judgment upon the immaterial counts. The cause of action means the cause of action upon which the plaintiffs recovered. The *dictum* of Erle, C. J., in *Blackmore v. Higgs* is too wide. He never intended to lay down the rule here contended for; he said that "the plaintiffs are to be in no better position by joining the whole in one action than they would have been in if they had brought two," because the Legislature had pointed out that the test was to be the action, not the cause of action; so that if a plaintiff includes in his plaint an unfounded claim he cannot succeed; but, if he includes a well-founded cause of action, that, together with the other, constitutes the action.—[LEFROY, C. J. Then you contend that, although the plaintiffs should not have upon the other causes of action recovered full costs, you may do so by joining them together?—Yes; by bringing an action for both causes of action, each of which was under £20, the plaintiffs have taken away the reason for depriving them of the full costs. If a plaintiff has two causes of action, and succeeds upon both of them, it is no hardship to give him full costs, because he has not harassed

(a) 15 C. B., N. S. 790.

the defendant.—[O'BRIEN, J. Then the defendant argues that, if in this action the plaintiffs recovered £5 on the last two counts, they should get full costs upon them; but that only half costs should be apportioned by the Taxing-officer on the other two counts.]—That would be impracticable, because the Taxing-officer has not any power under the 243rd section to do so.—[FITZGERALD, J. It might place the Taxing-officer in a difficulty; but there would not be anything impracticable in it. The Legislature dealt with the costs of the action as one entire thing.]

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FITZGERALD, J.

This case came before us on the 3rd and 4th of November last, on a motion made on behalf of the plaintiff to review the officer's taxation of costs. The officer allowed costs only on the reduced scale to the plaintiff, who had recovered a verdict on the first count; and the plaintiff contended that he was entitled to full costs.

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The plaint contained four counts: the first two were in contract, alleging the delivery by the plaintiff to the defendant of twenty-four head of cattle, to be delivered by the defendants in England, and the non-delivery of them in due time. The third count was trover, and the fourth detinue.—[His Lordship read them.]—From the Judge's notes of the trial it appears that no evidence was given in reference to the third and fourth counts; and therefore we can take the character of the action only from the statement in the plaint. The plaint embraces two causes of action—a cause of action founded on contract in the first two counts, and one in tort on the third and fourth counts; and in the absence of evidence by the plaintiff to show that the wrong was connected with contract, we must take it to be disconnected with contract, within the meaning of the Common Law Procedure Amendment Act (Ireland) 1853, s. 243.

The defendants pleaded a denial of liability on the first two counts; and to the third and fourth counts, which were founded on one and the same cause of action, namely, the loss of a bullock in some way or another, the defendants pleaded the payment into Court of a sum of £14. The plaintiff took issue on the defences to

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the first two counts; and the trial proceeded upon those issues. The plaintiff also took issue upon the sufficiency of the sum paid into Court on the last two counts. On these no evidence whatever was given at the trial; the plaintiff admitting the sufficiency of the sum paid into Court; and the defendants had a verdict upon that issue, and—as will presently appear—a verdict which entitles them to the costs incurred in respect of the third and fourth counts.

The question which has been raised for our decision arises upon the 243rd section of the Common Law Procedure Amendment Act (Ireland) 1853.—[His Lordship read the section].—The plaintiff having had on the first two counts a verdict and judgment for a sum less than £20, and the defendants having had a verdict and judgment on the last two counts, the Taxing-officer allowed the plaintiff but half costs on the first and second counts. In the course of the discussion and argument on this motion, which was not of very great consequence—for it is improbable that a similar state of facts will again arise in any other case—the plaintiff based his argument upon this, that his title to costs stood irrespective of the Common Law Procedure Act altogether; and that the defendants had failed to bring the plaintiff's case *in omnibus* within the proviso contained in the 243rd section of that Act; but, upon referring to the schedule of the Act, it will be found that the statute upon which the plaintiff's right to costs rests, as he alleges, has been repealed; and in fact it is under the Common Law Procedure Act alone that the plaintiff is entitled, if at all, to get full costs.

We now come to consider other sections of the Common Law Procedure Act bearing upon this question. It will not be necessary for me to refer, except very shortly, to the authorities which were cited, because the words "shall recover," in section 243, have received a large interpretation; as, for instance, in *Hughes v. Guinness* (a), where it was held that they do not mean "recover by verdict or judgment," but "obtain by means of the action." In that case money was paid into Court in an action of contract; and the plaintiff took issue on the sufficiency of the payment, and recovered on that issue a further sum, which brought the sum above

(a) 4 Ir. Com. Law Rep. 314.

£20; and the Court of Common Pleas held that the plaintiff was entitled to add the two sums together to bring himself within the Act; and I am not disposed to dissent from that decision. A further case—*Parr v. Lillicrap (a)*—was cited. There, the defendant paid money into Court, which the plaintiff took out in satisfaction of his claim; and on behalf of the defendant it was contended that the plaintiff was not entitled to any costs, because he had “*recovered*” nothing. The defendant relied upon a provision in the English statute similar to that in the Common Law Procedure Amendment Act (Ireland) 1853, s. 243; but the Court said that, though the plaintiff had not recovered anything by verdict or judgment, still he had obtained the money “by means of the suit;” and was therefore entitled to full costs.

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It is necessary for me to refer to the other sections of the Common Law Procedure Act (Ireland) 1853, in order that the ground of my judgment may be understood. By the 54th section it is provided that “causes of action, of whatever kind, (except in ejectment) may be joined *in the same summons and plaint*.”—In other words, that the same summons and plaint may embrace dissimilar actions. Of course that could not have been done previous to the Common Law Procedure Act 1853. The plaintiff in the present case availed himself of that privilege; and his plaint embraces two different actions—one in contract, and one in tort *disconnected* with contract; and these are not the less two separate actions because they are embraced in the same plaint.

The 75th section enables a defendant to pay money into Court in a larger way than he was previously entitled to do in certain classes of actions, and (amongst others) in actions of tort, as in the present case. The 76th and 77th sections make provision for drawing out of Court the money paid into Court, in case the plaintiff elects to accept it in full satisfaction of his demand; and the 78th section provides for the settlement of an issue touching the sufficiency of the sum paid into Court, if the plaintiff does not draw it out under the provisions of the two preceding sections—[His Lordship read the 78th section.]—That section exactly applies to the present case; for

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the issue joined on the third and fourth counts being whether the sum paid in under the 75th section was sufficient to satisfy the plaintiff's demand in respect of those causes of action, and no evidence having been given by him to prove its insufficiency, the defendant had a verdict and judgment thereon; and the statute says that in such a case the defendant shall have his costs of suit. Therefore the third and fourth counts are potentially out of consideration, except in the view which I shall now point out.

The defendant being thus entitled to judgment in the action of tort, the plaintiff contends that though in this action, so far as it is an action of contract, he has recovered a sum less than £20, he can call in aid the sum paid into Court in the action of tort in the other branch of the plaint; and that by adding together the two sums, so as to exceed £20, he becomes entitled to recover full costs. It seems to me that he cannot be permitted to do this. There are two actions here—one in contract, and one in tort *disconnected* with contract; and they are not the less to be considered two actions, separate and distinct in their true characters, because they are comprised in the same writ of summons and plaint. In the action of contract the plaintiff has recovered less than £20; on the other counts there is a verdict and judgment against him; and he is liable to the costs of suit on them; and it would be singular indeed if the plaintiff, being liable to the costs of suit in the action—so far as it is an action of tort—should be permitted to add the sum paid into Court on the counts in tort to the sum recovered in the action of contract, so as to entitle him to full costs of suit. I am of opinion that he has no such right, and that the ruling of the Taxing-officer was correct.

HAYES, J.

The defendants entered into a contract with the plaintiff for the carriage and safe delivery in England of some twenty-four head of black cattle within a reasonable time. The cattle were accordingly shipped, but were not duly delivered. It appears also that another beast of the plaintiff's was injured or destroyed on the defendants' premises when on its way to be shipped. In this state of things the

plaintiff issued his summons and plaint: it contained four counts. In the first two counts he claimed £50 as compensation for the non-delivery of the twenty-four head of cattle; and he also, by the last two counts, claimed £20 as compensation for the loss of the injured animals. These last counts were framed, one as in trover, and the other as in detinue; and they disclosed a cause of action perfectly distinct from that in the first two counts. The defendants paid £14. 2s. 6d. into Court on the third and fourth counts; and this not being taken out of Court in satisfaction, the case went down for trial on issues,—first, as to the contract and its breach; and, secondly, as to the sufficiency of the payment into Court. The jury found that the sum of £14. 2s. 6d. paid into Court was sufficient, but that the plaintiff was entitled to a sum of £14. 5s. 0d., as compensation for the non-delivery of the twenty-four beasts.

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On taxing the plaintiff's costs, the Master has held that, under the 243rd section of the Common Law Procedure Act, the plaintiff is only entitled to half costs; whereas the plaintiff insists that he is entitled to full costs, as referred to in that section.

In this latter view I concur. The plaintiff, as it now appears, had, at the commencement of the suit, two well-founded and distinct causes of action; and, as he was fully authorised by the statute, he joined them in one action, thus making his demand really to amount in the whole to £28. 7s. 6d. That action not being one disconnected "with contract," must, I think, be referred to the other alternative proposed by that section, and be regarded as "an action of contract," within its true meaning. The plaintiff then has recovered more than £20 in the action, made up as it is of the two causes; for he has recovered £14. 5s. 0d. by verdict and judgment, and he has recovered £14. 2s. 6d. by the defendants' own act and admission of record; which admission obviated the necessity of pressing that part of the case to a trial. No doubt the plaintiff has unwisely pushed it to trial; but that trial was not had for the purpose of ascertaining whether the plaintiff was entitled to compensation for the loss of the animal, but whether the compensation to which his adversary admitted him to be entitled was sufficient. The verdict for the defendants on that issue does not at all affect the

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soundness of the cause of complaint which plaintiff had when he brought his action, nor the defendants' admission with respect to it; it impliedly says that the plaintiff is entitled to the amount paid in, but no more.

It appears to me then that the plaintiff is entitled to his ordinary costs, subject however to deduction in respect of the issue found for the defendant on the sufficiency of the lodgment.

O'BRIEN, J.

I agree with my Brother HAYES, that the plaintiff is entitled to his full costs. The Common Law Procedure Act of 1852, by section 3 and schedule A, repealed (amongst others) the several Acts upon which depended a plaintiff's right to the costs of an action in which he succeeded; but then, by the first part of the 243rd section, it gives to a plaintiff succeeding in any action the costs set forth in schedule E (subject to their being altered by general order of the Judges); and the plaintiff in this case would therefore be entitled to such full costs, unless the case comes within the latter clause of that section, which provides.—[Read the proviso.]—It is therefore necessary for defendant to show that the present case is one of those in which, by the latter clause, the plaintiff is declared entitled only to half costs; and if (whether from unintentional omission, or otherwise) such a case as the present is not provided for by that clause, then the plaintiff should get full costs. It also appears to me that the necessity of defendant's showing that the case falls within that proviso, is the same as if the previous statutes as to costs were unrepealed, and that proviso introduced for the first time.

With respect to the construction of that clause, it is settled by the authorities to which we have been referred—*Hughes v Guinness* (a), and others—that, in deciding a plaintiff's right under that clause, to full or only half costs of an action, we should consider any money lodged in Court in that action by the defendant as part of the sum "*recovered*" in that action; and that accordingly a plaintiff would be entitled to full costs if the sum so lodged, together with

(a) 4 Ir. Com. Law Rep. 314.

the further sum recovered by a verdict, should amount to the sum required by that clause for the purpose, even though such further sum of itself be insufficient. In the present case therefore we are to consider the £14. 2s. 6d. lodged in Court on the third and fourth counts, as part of the sum "*recovered in the action*;" and this sum being added to the £14. 5s. 0d., found by the jury, make together £28. 7s. 6d., which exceeds the highest sum required. What then is there to warrant the conclusion that in such a case plaintiff should be entitled only to half costs, because the entire sum of £28. 7s. 6d. recovered in the action is composed of two sums recovered on different causes of action?

A question has been raised, whether we should consider the count in detinue as a count for "*a wrong disconnected with contract*." In schedule C to the Common Law Procedure Act of 1852 the action of detinue is classed among actions for "*wrongs independent of contract*;" but in the case of *Danby v. Lamb* (a) the Court expressed their opinion that the action of detinue should be classed amongst actions "*ex contractu*." And defendants' Counsel, at one period during the argument before us, relied upon that case as an authority for holding that in the present case the fourth count (that in detinue) should be considered as grounded on contract. If that be so, then the two sums which compose the £28. 7s. 6d. would have been recovered on causes of action grounded on contract,—a result that would appear to be more favourable to plaintiff's claim for full costs, as it was ultimately not disputed in the argument before us, that if a plaintiff stated in a summons and plaint two distinct causes of action "*ex contractu*," in separate counts, and recovered on each a sum less than £20, still that he would be entitled to full costs if the amount of those two sums together exceeded £20. If, however, the action of detinue should be considered as an action for a wrong disconnected with contract, then, in the present case, the two causes of action on which the two sums of £14. 5s. 0d. and £14. 2s. 6d. were respectively recovered would be different in character—one being for breach of contract, and the other being for a wrong disconnected with contract; and, even on such a supposi-

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tion, it appears to me that the present case is not within the latter clause or proviso of the 243rd section. The Common Law Procedure Act of 1852 enabled a party, for the first time, to join in the same summons and plaint causes of action on contracts with those for torts; but the clause in question does not *in terms* provide for such a case, or state what the effect as to costs would be where the sum recovered on each cause of action would be insufficient to entitle plaintiff to full costs (if that had been the sole cause of action sued on), but where the aggregate of all the sums recovered exceeds the highest sum which is required by the clause for that purpose in any action. In the present case the £14. 5s. 0d. recovered on the second count (for breach of contract) would not have entitled plaintiff to full costs, if that had been the sole cause of action; but, if the action had been confined to the third and fourth counts (for trover and detinue), and the plaintiff had recovered by verdict a sum equal to the £14. 2s. 6d. lodged in Court, he would have been entitled to his full costs of such action. It is true that plaintiff in the present case disputed the sufficiency of the sum lodged on the counts in trover and detinue, and that the issue on that question was found against him. For this however he is liable, under other sections of the Act to portions of the costs of the action; but where he went down to trial on another cause of action, and succeeded, I think that, as regards the general costs of the action, the sum of £14. 2s. 6d. lodged in Court is not the less to be considered as part of the sum recovered in this action, because the sufficiency of it to answer the claim on which it was lodged was unsuccessfully disputed by the plaintiff. It would clearly be so considered if plaintiff had admitted its sufficiency, or if the jury had found it insufficient. In the case of *Danby v. Lamb*, already referred to, the defendant had lodged in Court one shilling on the count in detinue, and £162. 9s. 7d. on the money counts; the plaintiff disputed the sufficiency of both lodgments. The jury found on the count in detinue one shilling damages in addition to the shilling lodged, but found for the defendant as to the sufficiency of the £162. 9s. 7d; and yet it appears from the judgments of Erle, C. J., and Byles, J., that in their

opinion the £162. 9s. 7d. should, upon the question raised in that case, as to the general costs of the action, be considered as having been "*recovered in the action*." The question as to costs in that case arose, it is true, upon a different statute from that now before us; but the principle upon which the money lodged in Court was considered as part of that recovered in the action, though its sufficiency was unsuccessfully disputed, is, I think, also applicable to the present case.

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It has however been contended that, where one cause of action "*ex contractu*," and another for "*tort disconnected with contract*," are joined in the same summons and plaint, we should consider it as the case of two actions, and construe the proviso in the 243rd section as importing that, in such a case, if the plaintiff did not recover £20 on the contract, he should get only half costs so far as regarded that ground of complaint. And that if he did not recover more than £5 for the tort, he should in like manner get only half costs so far as regarded that cause of action. To sustain such a construction of the clause in question it would, however, be requisite to introduce into it other terms and provisions which I think we should not be warranted in doing. And cases may be suggested (such as that of a plaintiff recovering £20 on the contract, and not more than £5 for the tort) in which it would be difficult to contend that it should be acted on in taxation. Defendants' Counsel have relied on the observations of Erle, C. J., in *Blackmore v. Higgs (a)*, where he states the rule to be:—
 "That where there are two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are, for the purposes of costs, to be treated as being as distinct as if there had been two separate actions." But those observations are to be considered with reference to the facts of that case. Part of the ground of complaint in the declaration was the breaking and entering of plaintiff's house, and the conversion of his goods. And the other ground was for an assault on plaintiff's wife. There was a verdict for defendant on all the issues joined as to the breaking and entering (some of which

(a) 15 C. B., N. S. 790, 793.

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involved the question of plaintiff's right to the house); and the plaintiff obtained a verdict only for the assault on his wife, with forty shillings damages. The Judge who tried the case made an order allowing plaintiff his costs under the provisions of the English County Courts Act, on the ground, that the cause of action was one for which a plaint could not have been entered in the County Court, inasmuch as the title to land came in question; but the Court of Common Pleas rescinded that order, on the ground that, as the assault, which was the only part of the case on which the plaintiff succeeded, was within the jurisdiction of the County Court, the plaintiff could not oust that jurisdiction, so as to entitle himself to costs, by joining with that cause of action another which he had altogether failed to sustain. The facts of that case are, however, essentially different from those of the present; and, although where plaintiff altogether fails as to one cause of action, the question as to his right to costs should be decided as if the other cause of action on which he succeeded was the only cause sued on, it by no means follows that where, as in the present case, the plaintiff has succeeded in both causes of action, such question should be decided as if he had brought a separate action for each cause. The decision in that case does not, therefore, govern the present: and I do not think it was intended that the rule laid down in those observations should be considered as applicable to such a case as that now before us; and it would be at variance with the opinion expressed by Erle, C. J., and Byles, J., in *Danby v. Lamb*, to which I have already referred.

With respect to the construction of our Common Law Procedure Act on this question, the 54th section provides, that "Causes of action of whatever kind (except in ejectment) may be joined in the same summons and plaint." It has been said that as this section uses the words "joined in the same summons and plaint," and not the words "joined in the same action," that accordingly a summons and plaint which contains a count in contract, and also a count for tort disconnected with contract, should be considered as comprising not merely "two causes of action," but also "two several actions." It appears to me, however, that there is a clear

distinction between the words "action" and "cause of action." M. V. 1864.
 The 5th and 6th sections of the Act were relied on by plaintiff's *Queen's Bench*
 Counsel as to the meaning of the word "action;" the 8th section
 speaks of an action "being brought." And I think that, though
 under the 54th section, "the action brought" should include in the
 same summons and plaint "several causes of action," it would not
 the less be but "one action:" and that we should not construe the
 proviso in the 243rd section as if, instead of the words "recover in
 any action," it had used the words "recover on any cause of
 action." One object of the Legislature in allowing so many
 different causes of action to be joined together, instead of being
 the subject of different actions, was to diminish the expense of
 litigation. And it would be more for the benefit of a defendant
 himself that the plaintiff should get against him the full costs of
 one suit which embraced several causes of action on which the
 plaintiff succeeded, than that such causes of action should be
 made the subject of several suits, in each of which defendant
 would have to pay plaintiff half costs, by reason of the insufficiency
 of the sum recovered, and would also have to bear the entire of his
 own costs. It has been further urged that a plaintiff might abuse
 this privilege given by the 54th section, if, by joining together
 several trivial causes of action in one suit, he might get the full
 costs of that suit; whereas if it were not for that privilege he would
 not bring any action whatever, inasmuch as the small amount to be
 recovered would not compensate him for the loss of half his costs.
 But if those several causes of action be well founded, and if
 the aggregate of the sums recovered on them be of the amount
 required by the statute to entitle a plaintiff to full costs, I do
 not see why we should hold him entitled only to half of the
 costs of even one suit, and thus effectually prevent his recovering
 any portion of his demands. Besides, it is to be observed that the
 54th section imposes a check on the abuse of this privilege, by
 empowering the Court or a Judge to prevent the trial of different
 causes together (if in any particular case such joint trial would be
 inexpedient), and to order separate records to be made up, and
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Several cases may be suggested to show that we should not put upon the statute the construction contended for by the defendants' Counsel; or hold that, as regards the question of costs, we should deal with the case of several causes of action comprised in one suit, as we would if a separate action had been brought on each cause. It is admitted we should not do so where an action is brought on several breaches of the same contract, or even on several distinct and independent contracts, where, though the plaintiff recovers less than £20 for each cause of action, the aggregate of the sums recovered exceeds £20. In such a case plaintiff would be entitled (it is admitted) to full costs, on the ground that he recovered £20 in an action of contract. Should not a similar result follow if an action were brought for several distinct and independent wrongs, all of them disconnected with contract, on each of which the plaintiff recovers less than £5, but where the total amount recovered exceeds that sum? If, then, in the case of an action brought on several distinct contracts, or of an action brought for several distinct wrongs disconnected with contracts, we are to consider, as to the question of costs, the aggregate of the sums recovered on each contract or for each wrong (as the case may be), why should we adopt a different rule when the action is grounded partly upon contract and partly upon wrong; particularly where, as in the present case, the entire sum recovered exceeds the highest sum required by the statute for full costs? I have already stated the reasons why, in my opinion, the £14. 2s. 6d. lodged in Court should, as regards the question of costs, be considered as part of the sum recovered in the action, although plaintiff had failed on the issue of its sufficiency. In the present case, as the entire sum recovered exceeds £20, it is not material to decide whether the action should be considered as being within the terms of the proviso relating to actions on contract, or within those relating to actions for tort disconnected with contract. I admit it would be necessary to do so, if (though the sum recovered for the tort exceeded £5) the amount of that sum and of the other recovered on the contract was less than £20; and in such a case it appears to me that plaintiff would be also entitled to full costs. Other cases

may arise in which, upon either construction of the proviso it would be difficult to decide its effect; if, for example, the sum recovered for the tort did not exceed £5, and the entire amount recovered both for the tort and on the contract were less than £20. But with respect to the present case I am of opinion, as already stated, that in order to disentitle plaintiff to his full costs it is necessary for defendant to show that the case is one of those in which, by the terms of the proviso, plaintiff should only get half costs; and that as it does not come within those terms, the plaintiff is entitled to full costs under the previous part of the 243rd section. It may have been an omission on the part of the Legislature not to include in the terms of that proviso the various cases that might arise in consequence of the power given by the 54th section to join in one action causes of action on contract with those for tort disconnected with contract; but it is not, I think, for us to supply the omission.

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LEFROY, C. J.

In this case I agree with my Brother FITZGERALD, who has adverted to all the cases bearing upon the subject, and therefore I shall not occupy time by adverting to them again; but I think that upon principle, and looking to the object of the Legislature, we are bound to make a distinction as to costs where the party recovers less than a certain sum. The policy of this new Act, and certainly one of its professed objects, was to diminish the costs of litigation, and to hold out the inducement also to sue in the Inferior Courts, where the parties could have their rights decided upon at much less expense. I would also further add that there was great good sense and policy in making the plaintiff, whose right to costs against the defendant was a mere legislative right, sue in the Inferior Courts, or lose one-half of his costs. The plaintiff is entitled by statute to get costs against the defendant; and he gets them in the ordinary manner, by the jury finding, according to the statute, sixpence costs; for the statute enacts that the plaintiff shall not recover any costs against the defendant, unless the jury give him costs as well as damages; and the plaintiff gets them under the

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name of costs *de incremento*, so as to cover all his costs in the cause. Now the statute, which reduces the plaintiff's right to costs when he does not recover above a certain sum, is an Act made for the ease and advantage of defendants; and so it has operated. For, if the plaintiff has the inducement of getting the full amount of his costs by suing in the Superior Courts, the very threat of an action may very often compel a defendant to yield to the claim which otherwise he would have a just right to resist. The very threat of an action in the Superior Courts, and the consequences following that the party is entitled to his full costs, is very often an oppressive way of obliging a defendant to yield to an unjust claim; and therefore the Legislature have made a distinction which it should not be in the power of the plaintiff to evade—the law which makes a distinction between costs in actions of tort and costs in actions of contract, by joining a small matter with respect to a tort, so as to entitle him to get, by joining both together, full costs, and put himself in the position in which he would not and could not have been if he rested upon his case *ex contractu*. Here the plaintiff is not put to the election which he ought to be put to, and which the Legislature holds out an encouragement to him to make, namely, the jurisdiction of the Inferior Court, by holding out to him the disadvantage which the law imposes, of his losing half his costs if he brings into the Superior Court that case which could be adequately tried in the Inferior Court; and therefore it is that he should not evade the law, by joining to his cause of action *ex contractu* a small matter in tort, and then, adding the two together, to make an amount which he says he has recovered in the action, so as to evade the penalty which attaches to not recovering a certain sum—namely, getting only half costs. The maxim of law is,—“*Quando duo jura in unâ personâ concurrunt, æquum est ac si essent in diversis.*” The same rule that applies to rights, I would apply to disabilities. We are not to relieve the plaintiff from the disability that he suffers here by having recovered on the two counts in contract less than £20. We are not to relieve him from this disability, by allowing him to join to the cause of action in contract the matter *ex delicto*, and so free him from the disability that he would have laboured

under if he had rested only on the first two counts. The parties went to trial upon the matter *ex contractu*; they never went to trial upon the other part. But I do not put it upon what *de facto* occurred; but upon the principle showing the mischief that would follow if the party was allowed to take himself out of the case, which the Legislature has provided for him, by suing in the Superior Courts. Therefore, I am of opinion that the Taxing-officer was perfectly right in giving only half costs to the plaintiff.

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EDWARD WALSH v. JAMES and WILLIAM WALSH.*

(*Exchequer.*)

M. T. 1866.
 Nov. 4.

THIS was a motion by the defendant James Walsh to review a decision of the Taxing-master. The summons and plaint in the action contained two counts: the first for assault and battery; the second for obstructing a right of way. To these the defendant James Walsh pleaded, and traversed the first count; and, as to the second count, paid £5 into Court; alleging that that sum was sufficient to satisfy the plaintiff's claim in the second count. William Walsh filed no defence; and the plaintiff drew out the money paid in on the second count, in full satisfaction of the cause of action. An issue was sent to the jury on the first count. The jury found for the plaintiff, assessing the damages at £1 over and above the sum paid into Court. No certificate was obtained from the Judge at the trial. The Taxing-master allowed the plaintiff his full costs.

Costs.—Action for assault and battery, and obstruction of right of way, against W. and J.; W. allowed judgment to go by default. J. paid £5 into Court on the second count, and traversed first; and issue was taken on the traverse; the jury found a verdict for £1. The Taxing-officer allowed plaintiff's full costs. The Judge gave no certificate.

Dames.

Hughes v. Guinness (a) does not touch this case; for there the defendant paid the money in on the wrong plea, and paid in too

Held, that the plaintiff was not entitled to costs.

(a) 4 Ir. Com. Law Rep. 314; S. C., 7 Ir. Jur. 298.

* Before the Full Court.

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little. Besides sections 126 and 243 of the Common Law Procedure Act (16 & 17 Vic., c. 113), we must look at sections 75 and 78. The money being paid into Court on the second count, the plaintiff must adopt either the course permitted him under section 76, and draw the money out in full satisfaction of his cause of action, or that under section 78; if he adopts the latter he must take an issue as to the sufficiency of the sum paid into Court. He has adopted that under section 76; and that is equivalent to having entered a *nolle prosequi* on the second count. That sum of £5 would disappear from the judgment; and the plaintiff would be entitled to have an order for the taxation of his costs forthwith. Could he have that before the action was otherwise disposed of if his right of action still existed? The rule in England expressly postpones the right of the party to do this, but no such rule exists here.—[FITZGERALD, B. Would not the plaintiff be obliged to introduce all this transaction upon the Nisi Prius record?—These two counts referred to two totally different causes of action; and one of them was gone before trial. Plaintiff may rely on the fifth section of the Common Law Procedure Act. That section abolishes *forms* of action; but we must read it by the light of the 54th section—"Causes of actions, of whatever kind (except in ejectment) may be joined in the same summons and plaint, provided," &c. There are still distinct causes of action, though there is no longer any distinction as to the particular form of stating them: *Blackmore v. Higgs* (a).—[PICKOT, C. B. Suppose the plaintiff had drawn the money out of the Court, but had denied its sufficiency, and there was a verdict against him on that issue, would the defendant have been entitled to full costs?—Yes.—[FITZGERALD, B. Would not that principle go to this length that, if no money were paid into Court at all, and a verdict were had for £5, and then for £1 he should get costs?—Yes, if pushed to its full length; but that is not necessary: *Devine v. The London and North-Western Railway Company* (b); *James v. Vade* (c). Are we to be in no better position from having paid

(a) 15 C. B., N. S. 790, 793. (b) 10 Ir. Jur., N. S. 26; S. C., *supra*, 174.

(c) 29 Law Jour., Q. B. 129.

this money into Court than we would be in if we had done nothing? M. T. 1866.

—[PIGOT, C. B. Do they deal with *Blackmore v. Higgs* in *Devine's case*?]—The ground on which the Judges held for plaintiff was quite different; for they held that the wrong complained of was one disconnected with contract. As to the effect of taking money out of Court—*Goodee v. Goldsmith* (a); *Harrison v. Watt* (b). The receipt for the money states that it is accepted for plaintiff's whole cause of action, as directed under section 77.—[PIGOT, C. B. The cause of action shall be considered as "struck out" of the declaration, is the language of the old rules.—HUGHES, B. If you are right, I do not see what advantage there is in paying any money at all into Court].

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Ryan, in support of the Taxing-master.

The plaintiff could not have asked for a certificate, from the peculiarity of the case. This question depends upon sections 126 and 243. This was an action for wrong; and we recovered £6 in the action; we recovered against the other defendant under section 97; and against him we recovered £100. *Hughes v. Guinness* decides that money lodged in Court is money recovered in the action. *Devine v. The London and North-Western Railway Company* does not touch this case; nor does *O'Rorke v. M'Donnell* (c).—[FITZGERALD, B. Was not the sum in *Hughes v. Guinness* in exactly the same cause of action?—Yes.—[FITZGERALD, B. You say that, if there is no section specially for assaults, actions for assault would come under tort in section 243?—Yes.—[PIGOT, C. B. Suppose for £1000 and for £10; £1000 paid into Court, and proceedings for the £10, can plaintiff then get costs?—Does payment into Court alone, without anything being done further in the case amount to recovery at all?—[DEASY, B., referred to *Farmer v. Fottrell* (d).—[PIGOT, C. B. Is there any authority actually deciding, that where there are several demands in contract, and all are covered by money paid into Court, and then issue, for damages *ultra* as to amount, and then verdict of £15, what becomes of the

(a) 2 M. & W. 202.

(b) 16 M. & W. 316.

(c) 13 Ir. Com. Law. Rep., App. 8.

(d) 4 Ir. Jur. N. S. 37.

M. T. 1864. costs?—FITZGERALD, B. Are not two counts upon contract as distinct as two counts, one upon contract and one upon *tort*?—
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Nov. 5 *Ryan* this day stated he could find no authority on the case put by the LORD CHIEF BARON.

Cur. adv. vult.

PIGOT, C. B.

Nov. 7. In this action the plaintiff sued James Walsh and William Walsh, in the first count of the plaint, for an assault and battery; in the second, for a disturbance of a right of way. The defendant William allowed judgment to go by default; the defendant James paid into Court, upon the second count, £5, alleging in his defence that it was sufficient to satisfy the plaintiff's claim on that count; and, as to the first count, he denied the assault and battery. The plaintiff took the money out of Court; and the single issue upon which the plaintiff proceeded to trial was, "whether the said James Walsh assaulted, beat, and wounded the plaintiff, as in the first count alleged." At the trial before me, the jury found in the affirmative of the issue, and assessed the damages at £1.

No certificate was given under the 126th section of the Common Law Procedure Act, that the assault and battery had been proved: in fact no battery was proved at the trial.

The Taxing-officer, upon the taxation of costs, allowed the plaintiff his full costs of suit; considering (as I collect) that, as the action was for "wrong and injury," and as the plaintiff obtained by the payment of £5 into Court, and of the verdict for £1 damages, more than £5, by means of the suit, this was a *recovery* of more than forty shillings under the 126th section, and of more than £5 under the 243rd section of the Common Law Procedure Act.

There has been some fluctuation in the opinion of the Courts of Law, both in this country and in England, as to the meaning of the word "recover" in the sections of several statutes limiting the amount of the plaintiff's costs, by reference to the amount which he

shall recover in an action. In England it has been settled, by the M. T. 1866.
 decisions in the cases of *Parr v. Lillicrap* (a) and *Boulding v. Tyler* (b), overruling some former decisions, that, where the de- ^{Exchequer.}
 fendant pays money into Court amounting to less than £20, which WALSH
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 the plaintiff accepts in satisfaction of his claim, the plaintiff must be held to "recover" the amount, within the meaning of the 13 & 14 Vic., c. 61, s. 11, which, in certain cases, deprives a plaintiff of his costs if he "shall recover a sum not exceeding £20." And in this country it has been decided by the Court of Common Pleas, in *Hughes v. Guinness* (c), that where, in an action on a contract, the defendant paid less than £20 into Court, and the plaintiff at the trial obtained a verdict for a sum over and above the money so paid, but also less than £20—both sums however in the aggregate exceeding £20—there the plaintiff having, by means of his suit, obtained £20 (and more), was to be treated as having "recovered" the entire of the two sums together in the action, and therefore entitled to his full costs of suit. That decision was in conformity with a former decision in England, in *Fewster v. Boggett* (d)—not cited in the argument in *Hughes v. Guinness*, but mentioned by Counsel after the Court had given judgment,—and also with the principle of the decision in *Crosse v. Leaman* (e), not cited in the argument, but referred to in a note to the report of *Hughes v. Guinness* (f).

If the plaintiff in this action, instead of taking the money out of Court, had disputed the sufficiency of the payment, and having proceeded to trial for the recovery of more, had obtained upon the first count a verdict for any amount, however small, in excess of that payment, we should have had to consider the application of those authorities. For instance, if the plaintiff had recovered on the first count one shilling damages over the £5 paid into Court, and nineteen shillings damages on the second count, we should have had to determine whether, although upon the count for an assault and battery there was a finding for less than forty shillings damages,

(a) 1 Hur. & Colt, 615.

(b) 3 Best & Smith, 472.

(c) 4 Ir. Com. Law Rep. 314.

(d) 9 M. & W. 20.

(e) 11 C. B. 524.

(f) 4 Ir. Com. Law Rep. 317.

M. T. 1866. and there was no certificate of the Judge, and although upon the
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I am, however, of opinion that the motion before us may be decided upon narrower grounds, and may be determined upon the terms of the 126th section.

That section enacts that, in all actions for a trespass for assault and battery, “the plaintiff in such action, in case the jury shall find “the damages to be under the value of forty shillings, shall not “recover or obtain more costs of suit than the damages so found “shall amount unto; unless the Judge at the trial shall certify “under his hand, on the back of the abstract for *Nisi Prius*, that “the assault and battery was sufficiently proved by the plaintiff “against the defendant.” I omit, in this recital, the words of the section which refer to other actions. In the present case, the plaint contained two counts only, each for a separate cause of action distinct in its nature from the other. On one of these the defendant paid £5 into Court, in discharge of the plaintiff’s demand on that count. This he did under the 75th section of the Common Law Procedure Act. The plaintiff accepted that sum, and obtained payment of it out of Court. This he did under the 76th section; and this he could do (without consent) only under that section. By that section, this can only be done where the money “has been “lodged in Court *in discharge of the plaintiff’s demand*, or on a “plea of tender.” And under the 77th section it is plain that the money lodged, if accepted by the plaintiff at all, must be accepted in full satisfaction of his demand; and that it *is* so accepted must be stated in the receipt for the money which the plaintiff is to give to the Master. The words of the 77th section are:—“In case the “plaintiff shall accept the amount lodged in full satisfaction of the “demand, the receipt for the money given to the Master shall state “that it has been so accepted.” It is not disputed that the money

was lodged, and accepted, in conformity with those sections of the Common Law Procedure Act. M. T. 1866.

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The result of this appears to me to be that, upon the plaintiff's acceptance of the money, the cause of action in the second count was completely at an end, the demand upon it being satisfied, under the statute, by such acceptance; and the action was then no longer an action for the disturbance of a right of way and for assault and battery, but became, by the plaintiff's own act, an action solely for assault and battery against the defendant James Walsh; and as such, and as such only, was, by the plaintiff, prosecuted and brought to trial. And if that be so, the case is directly within the express terms of the 126th section of the Common Law Procedure Act; for in this action for assault and battery the jury have found the damages to be under the value of forty shillings; and the Judge, at the trial, has not certified that the assault and battery were sufficiently proved.

The language of Lord Chief Justice Erle (and a higher authority could not be referred to) has been cited at the Bar, from the report of the case of *Blackmore v. Higgs (a)*. The decision in that case does not govern the present; and the eminent and most able Judge who used the language referred to only conveyed his opinion as to the mode in which pleadings and proceedings, in a case not very dissimilar to the present, ought to be dealt with. What he stated conveyed so much of sound sense and plain justice, that I, for one, should desire to apply it whenever, in reference to costs, it could be applied consistently with the enactments of the Legislature. The action in *Blackmore v. Higgs* was at the suit of husband and wife; Lord Chief Justice Erle said:—"The plaintiffs bring their action for three causes—a trespass to their premises, conversion of their goods, and an assault on the wife. It is only in respect of the excess in the latter that the plaintiffs obtain a verdict for forty shillings. The plaintiffs' true cause of action therefore was, for the excess in the assault upon the wife, and for that the action clearly could be brought in the County Court. The plaintiffs claim costs on the ground that, taking the whole record together,

(a) 15 C. B., N. S. 793.

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"the title to land appears to have come in question. But I take
"the rule to be this; that, where there are two causes of action
"disclosed by the declaration, and a distinct line of pleading
"applicable to each, the two are for the purposes of costs to be
"treated as being as distinct as if there had been two separate
"actions. I think the plaintiffs are to be in no better position
"by joining the whole in one action than they would have been in
"if they had brought two." I apply that language to the case now
before us to this extent, and to this extent only, that as Lord
Chief Justice Erle and the rest of the Court treated the action
in *Blackmore v. Higgs* as in substance only an action for an
assault upon the female plaintiff, because the event of the trial and
the verdict of the jury showed that no other cause of action existed,
so, in the present case, we ought to hold that this action was an
action for assault and battery only, after the plaintiff had accepted
the money lodged in Court in full satisfaction of his other demand
for the disturbance of the right of way; because, by his own act he
had removed all question upon that other demand, and had pro-
secuted the action for no other purpose than that of recovering
damages for the assault and battery.

I may observe, that no question was raised (and perhaps none
could have been raised) in reference to the defendant William
Walsh.

I have forbore to refer to the case of *Devine v. The London
and North Western Railway Company* (a). That case was not the
same as the present; and the members of the Court were equally
divided.

We grant the application, and direct the taxation of costs to be
reviewed by allowing to the plaintiff no more costs than the amount
of damages found by the jury.

FITZGERALD, HUGHES, and DEASY, BB., concurred.

(a) 10 Ir. Jur., N. S. 26; S. C., *supra*, 174.

M. T. 1866.
Exchequer.

KIERNAN v. BRERETON and others.*

Nov. 26, 27.

ACTION for work and labour, and on money counts. The particulars claimed £233. 3s. 11d., as the amount of three several bills of costs of plaintiff, as attorney and solicitor for Robert Laurence Brereton, William Watson Brereton, and Caroline Catherine Brereton.

Robert Laurence Brereton pleaded separately. William Watson Brereton and Caroline C. Brereton pleaded together.

Sixth plea to count for work and labour, that no such bill as required by statute 12 & 13 Vic., c. 53, was delivered by plaintiff to defendants W. W. Brereton and C. C. Brereton.

The case was tried before Mr. Baron DEASY, in the Consolidated Nisi Prius Court, in Trinity Term.

At the trial, a joint retainer of the plaintiff by all the defendants was proved for certain portions of the bills of costs; that R. L. Brereton acted for the other two defendants, who resided out of the jurisdiction, under a power of attorney from them; and that R. L. Brereton was personally served with the three bills of costs.

The bills of costs were referred to as bills Nos. 1, 2, and 3.

No. 1 was a bill of Chancery costs; it was entitled in margin "Henry Wray Brereton, William Watson Brereton, Robert Laurence Brereton, plaintiffs; Felthorn Watson, defendant; William Watson Brereton, Robert Laurence Brereton, Caroline Catherine Brereton, petitioners; Carroll Watson and, by suggestion, Thomas Sadleir, respondents;" and was headed "In Chancery: Miscellaneous costs in these causes between solicitor and client."

The bill was signed "Francis Kiernan, 19 Westmoreland-street;"

citor and client," and directed to R. There were some items in the bill of Chancery costs with which R alone was chargeable.

Held, that the bill of Chancery costs was insufficient to charge W. and C.

* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

A bill of costs, in order to comply with the statute 12 and 13 Vic., c. 53, s. 2, must clearly point out on the face of it, or by some writing connected with it, the party or parties to be charged.

K., an attorney, was jointly retained by R., W., and C., to conduct certain proceedings in Chancery and in the Landed Estates Court, and delivered two bills of costs to R. One, a bill of Chancery costs, was entitled in the margin in the causes and matters, and endorsed "Miscellaneous costs of R.," and directed to R. The other, of Landed Estates Court costs, was entitled in the matters, and headed "Costs of R., W., and C.," and endorsed "Costs between soli-

M. T. 1866. and endorsed "Brereton v. Watson. Copy of miscellaneous costs
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 of Robert L. Brereton, Esq." "Robert L. Brereton, Esq., 27
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 v. Summer-hill." There were certain items in it for which Robert L.
 BRERETON. Brereton alone was liable.

Bill No. 2 was entitled in margin "Carroll Watson plaintiff; Thomas Nugent defendant;" and was headed "Common Pleas: Plaintiff's costs between solicitor and client," and was endorsed "Watson v. Nugent. Copy costs between solicitor and client." "Robert Laurence Brereton, Esq., No. 27 Summer-hill."

Bill No. 3 was of costs in Landed Estates Court, headed "Costs of "Robert L. Brereton, William Watson Brereton, and Caroline C. "Brereton," and directed to Robert L. Brereton.

At the close of plaintiff's case, Counsel for the defendants W. W. Brereton and C. C. Brereton called on the Judge to direct a verdict for these two defendants upon so much of the six pleas as related to bills Nos. 1 and 2, on the grounds that they did not show that W. W. Brereton and C. C. Brereton were chargeable or intended to be charged by them.

Mr. Baron DEASY directed a verdict for defendants as to bill No. 2, but ruled in favour of plaintiff as to bill No. 1, reserving leave to defendants W. W. Brereton and C. C. Brereton to move to have a verdict entered for them upon the sixth plea, as far as it related to bill No. 1, and to reduce the verdict against them by the amount of bill No. 1.

Palles, in this Term, obtained a conditional order pursuant to leave reserved.

C. Shaw, and *E. F. Litton*, now showed cause.

The defendants have notice that they were the parties to be charged: *Warren v. Cunningham* (a). Refers to statute 12 & 13 Vic., c. 25, s. 2, and cites *Frowd v. Stillard* (b); *Brooks v. Mason* (c); *Holmes v. Magrath* (d). This is a demand against the three defendants jointly: *Finchett v. How* (e). W. W. Brereton

(a) Gow. N. P. 71.

(b) 4 C. & P. 51.

(c) 1 H. Bl. 290.

(d) 5 Ir. Law Rep. 376.

(e) 2 Camp. 275.

and C. C. Brereton gave a power of attorney to R. L. Brereton to act for them. All the statute requires is that the attorney should deliver a signed bill of costs. The Act ought not to be construed strictly against the attorney.—[HUGHES, B. Was not the object of the Act to protect a client who did not know law?]*—Lucas v. Roberts (a)* shows that an envelope is as good as a heading: *Champ v. Stokes (b)*; *Daubney v. Phipps (c)*; *Manning v. Glynn (d)*; *Gridley v. Austen (e)*.

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Palles, and *Bewley*, in support of the rule.

The question is, is there enough on the face of the bill to show that W. W. Brereton and C. C. Brereton are to be charged by it. It rather shows that R. L. Brereton is the only person to be charged. It is not enough that defendant should be a person chargeable by a bill; he must be the person charged by the bill. *Daubney v. Phipps (f)* and *Champ v. Stokes (g)* do not touch this case. The cases show that delivery of the bill to the person to be charged is not sufficient to charge him: *Manning v. Glynn (h)*. C. C. Brereton could never have imagined, on reading the title and heading of this bill, that she was to be charged with it, as she was no party to the cause.

FITZGERALD, B.

I have no doubt in this case. The statute clearly requires a distinct intention to charge the defendants either to appear upon the bill itself or by some writing to be connected with it. There is no apparent intention in this bill to charge William Watson Brereton or Caroline Catherine Brereton.

We must order the verdict to be reduced, and the conditional order made absolute, and, of course, with costs.

HUGHES and DEASY, BB., concurred.

Conditional order made absolute.

(a) 11 Exch. 41.

(c) 16 Q. B. 507, 514.

(e) 16 Q. B. 504.

(g) 6 H. & N. 683.

(b) 6 H. & N. 683.

(d) 1 Jones, 513.

(f) 16 Q. B. 507, 514.

(h) 1 Jones, 513.

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Crim. Cases.
Reserved.

COURT FOR CRIMINAL CASES RESERVED.*

THE QUEEN *v.* ROBERT WALLACE.

THE QUEEN *v.* SCOTT.

THE QUEEN *v.* TEEVAN.

THE QUEEN *v.* COX.

THE QUEEN *v.* SIMPSON.

Nov. 18.

H. T. 1866.

Feb. 12.

Certain Acts of Parliament made copies of *The Dublin Gazette*, "purporting to be printed and published by the Queen's authority," conclusive evidence in certain cases under those Acts. On the trial of the prisoner, a copy of *The Dublin Gazette* was given in evidence. It purported to be printed and published at *The Dublin Gazette* office, No. 87 A. street, by A. T., of, &c. It also contained, under the title, the words, "published by authority."

Held, that the document in question was not evidence within the Acts of Parliament, and the conviction was accordingly erroneous.

THESE were five cases reserved by Mr. Baron FITZGERALD, all on the same point. In the first of them the following case was stated by the learned Baron:—

The prisoner was tried before me at the last Summer Assizes for the county of Antrim, on an indictment charging that he, on the 15th of July 1865, at Belfast, within the proclaimed district of Shankhill, unlawfully did carry and have a pistol, an ounce of gunpowder, and certain ammunition, to wit, &c.

The indictment was founded on the 11 *Vic.*, c. 2, s. 9. The first section of that Act enacts:—"That whenever, in the judgment
 "of the Lord Lieutenant, or other Chief Governor or Governors
 "of Ireland, by and with the advice of the Privy Council of Ire-
 "land, it shall be necessary for the prevention of crime and outrage
 "that this Act should apply to any county, county of a city, or
 "county of a town, or any barony or baronies, half-barony or half-
 "baronies, in any county at large, or any district of less extent
 "than any barony or half-barony in Ireland, it shall be lawful,
 "to and for the Lord Lieutenant, or other Chief Governor or
 "Governors of Ireland, by and with the advice of the Privy
 "Council of Ireland, to declare by proclamation, *to be published*
 "*in the Dublin Gazette*, that, from and after a day to be named
 "in such proclamation, this Act shall apply to any county, county

* *Coram* MONAHAN, C. J., PIGOT, C. B., KEOGH, CHRISTIAN, O'BRIEN, and HAYES, JJ., FITZGERALD, HUGHES, and DEASY, BB., and O'HAGAN. J.

"of a city, or county of a town, or county at large, or any barony
 "or baronies, half-barony or half-baronies, in any county at large,
 "or any district of less extent than any barony or half-barony in
 "Ireland."

M. T. 1856.

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The 9th section enacts :—" That, from and after the day named
 "in any such first-mentioned proclamation, and thenceforth during
 "all the time for which any such proclamation shall be in force,
 "it shall not be lawful for any person whomsoever (with certain
 "exceptions not applying to the prisoner) to carry or have *within*
 "*the district specified in any such proclamation*, elsewhere than
 "in his or her own dwelling-house, any gun, pistol, or other
 "fire-arm, or any part or parts of any gun, pistol, or other fire-
 "arm, or any sword, cutlass, pike, or bayonet, or any bullets,
 "gunpowder, or ammunition; and every person carrying or having
 "any gun, pistol, or other fire-arm, or any part or parts of any
 "gun, pistol, or other fire-arm, or any sword, cutlass, pike, or
 "bayonet, or any bullets, gunpowder, or ammunition, contrary to
 "the provisions of this Act, shall be guilty of a misdemeanour,
 "and shall be liable, on conviction, to the punishment therein
 "mentioned."

The 21st section enacts :—" That the production of '*The Dublin*
 "*Gazette*,' purporting to be printed by the Queen's printers, con-
 "taining the publication of any proclamation, warrant, or notice,
 "under this Act, shall be deemed and taken to be conclusive
 "evidence in all Courts of Justice in Ireland of all such facts
 "and circumstances as were or shall be necessary to authorise the
 "issuing of any such proclamation, warrant, order, or notice; and
 "every such proclamation, warrant, order, and notice, shall be
 "deemed and taken in all such Courts respectively, to all intents
 "and purposes whatsoever, to have been issued in conformity with
 "this Act."

The Act of 11 Vic., which was originally in force only until the
 31st of December 1849, and from thence until the end of the then
 next session of Parliament, was continued, with certain amend-
 ments, by several subsequent Acts, of which it is material only
 to mention the 19 & 20 Vic., c. 36, called the "Peace Preservation

M. T. 1865. (Ireland) Act 1856, the 23 & 24 *Vic.*, c. 138, and the 28 & 29 *Vic.*,
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Reserved. c. 118.

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The third section of the last-mentioned Act enacts—"That
 "the production of a printed copy of *The Dublin Gazette*, pur-
 "porting to be printed and published by the Queen's authority,
 "containing the publication of any proclamation, warrant, order, or
 "notice, under the said recited Act (*i. e.*, the Peace Preservation
 "(Ireland) Act 1856), or this Act, shall be conclusive evidence of
 "of all such facts and circumstances as were or shall be necessary to
 "authorise the issuing of any such proclamation, warrant, order, or
 "notice; and every such proclamation, warrant, order, and notice
 "shall be deemed and taken in *all such Courts* respectively, to
 "all intents and purposes whatsoever, to have been issued in
 "conformity with the said recited Act and this Act."

By the fifth section, the "Peace Preservation (Ireland) Act
 1856," as amended by this Act, is continued until the 1st of July
 1866, and from thence until the end of the then next session of
 Parliament.

The 19 & 20 *Vic.*, c. 36, was the continuing Act in force at
 the time when it was alleged that the district of Shankhill was
 proclaimed. The 23 & 24 *Vic.*, c. 36, was the continuing Act
 in force when the offence charged was alleged to have been com-
 mitted. And the 28 & 29 *Vic.*, c. 118, was the continuing Act
 in force at the time of the prisoner's trial.

At the trial it was proved that the prisoner had and carried
 the arms, &c., mentioned in the indictment, within the parish of
 Shankhill, in the barony of Upper Belfast and county of Antrim.

The only proof offered that the said parish was a district spe-
 cified in any proclamation mentioned in the said Acts was a
 printed paper purporting to be *The Dublin Gazette* of Friday
 September 18th, 1857, and containing what purported to be a
 proclamation by the Lord Lieutenant and Privy Council of Ire-
 land, declaring that from and after Friday the 18th day of
 September 1857, the "Peace Preservation (Ireland) Act 1866"
 shall apply to and be in force in and for the parish of Shankhill,
 in the barony of Upper Belfast and county of Antrim; and the

said proclamation purports to be given at the Council Chamber, Dublin Castle, on the 15th of September 1857.

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The said printed paper, to which I beg leave to refer, purports to be—"Printed and published at *The Dublin Gazette* office, "No. 87 Abbey-street, by Alexander Thom; of Nos. 87 and 88 "Middle Abbey-street, in the parish of St. Thomas, in the city "of Dublin." But it did not in any other way purport to be printed by the Queen's printers or printer. The said printed paper also contained, under the title thereof, that is to say, under the words "*The Dublin Gazette*," the words "Published by authority," but did not in any other way purport to be printed and published by the Queen's authority.

It was objected, on the part of the prisoner, that the said printed paper was not sufficient evidence of the said proclamation, or that the parish of Shankhill was a district specified in any proclamation under the said Acts, or any of them.

I allowed the case to go to the jury; and the prisoner was convicted. I sentenced him to be imprisoned for three calendar months, and to be kept to hard labour; but I respited the execution of the said judgment until the question in this case shall be decided, on the said prisoner's entering into recognizances of bail, himself in £20, and two sureties in £10 each, to render himself in execution on the first day of the next Assizes for the county of Antrim, if the question shall be decided against him.

The single question for the decision of the Court is, "Whether "the production of the said printed paper was sufficient evidence "of the proclamation therein contained, and that the said parish "of Shankhill was a district specified in a proclamation under the "said 'Peace Preservation (Ireland) Act 1856'?"—If so, the said conviction is to stand; if otherwise, to be reversed.

F. A. FITZGERALD.

Joy (with him *Ludlow* and *Norwood*), for the prisoner.

The first point is as to the interpretation of this section, 28 & 29 *Vic.*, c. 118, s. 3. Refers to *Smith v. Bell* (a); *Sussex Peerage*

(a) 10 M. & W. 389.

M. T. 1865. *case (a)*. As to the intention of the Legislature, *Fordyce v. Bridges (b)*, the statute is penal, and so should be construed strictly; modern construction of modern statutes, is much stricter than of ancient ones, because modern Acts are intended to embrace every case, not to enact a general principle: *Bradley v. Clark (c)*—*per* Mr. J. Buller. This document is no evidence; the Common Law rule is to be found in *Rex v. Holt (d)*. *Byrne v. Humphreys (e)* shows that *The Gazette* should purport to be printed by the Queen's printer. The words here are "Printed by Alex. Thom," and there is no evidence that he was the Queen's printer. Even if "published by authority" means published by the Queen's authority, can authority to publish be held authority to print and publish? But this is what the Act requires.

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Barry (with him the *Solicitor-General*), for the Crown.

If the document produced was not within the statute, all the prisoners' Counsel could contend for was that, as no conclusive evidence had been given, they were at liberty to rebut it. If the section was not there at all, *The Dublin Gazette*, purporting to be printed as *The Dublin Gazette*, would be evidence still, though it might be open to the prisoners to show it was not evidence of any Act of state. It is a misdemeanour for any one but the Queen's printer to publish an Act of state: *Rex v. Sutton (f)*; 1 *Taylor on Evidence*, 4th ed., p. 23; *Rex v. Forsythe (g)*. It is only *prima facie* evidence without the statute. In *Rex v. Holt* the question was, whether the document in question purported to be *The London Gazette*, and its being printed by the Queen's printers was held evidence. "By authority" here must mean by the only authority that could justify the publishing of it. Any language equivalent to the words of the Act will be sufficient.—[CHRISTIAN, J. It is not impossible that it might be printed without authority and published with it.]—*The Gazette* is always *prima facie* evidence at Common Law.—[PIGOT, C. B. If it was *prima facie* evidence

(a) 11 Cl. & Fin. 143.

(c) 5 T. R. 201.

(e) 1 Law Rec. O. S. 233.

(b) 1 H. L. C. C. 4.

(d) 5 T. R. 436.

(f) 4 M. & S. 542.

(g) R. & R. 274.

made conclusive by statute, why should it be necessary to be printed by the Queen's printer? Can you say that the Legislature contemplated any *Gazette* published by any other authority?]

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Norwood, in reply.

The words of the Act are not retrospective, they are "proclamation to be issued." Cites 1 *Taylor on Evidence*, p. 16, sec. 7; *Pritchard v. Black* (a).

Cur. adv. vult.

H. T. 1866.
Feb. 12.

MONAHAN, C. J., this day delivered the judgment of the Court.

In this case the question reserved for the consideration of the Court is, whether at the trial there was sufficient evidence of the place in which the offence was committed being a proclaimed district. The only evidence of a proclamation having issued, or been published in *The Dublin Gazette*, was the production of a printed paper purporting to be *The Dublin Gazette*, printed by A. Thom, Abbey-street, and containing a statement "published by authority." It has not been contended by the *Solicitor-General* that the paper so produced comes within the requirements of the 3rd section of the 28 & 29 *Vic.*, c. 118, not purporting to have been published by the Queen's authority. Neither can it come within the provisions of the 11th of *Vic.*, c. 2, s. 9, not purporting to have been printed and published by the Queen's printers. But the argument of the *Solicitor-General* was that, because it purports to be *The Dublin Gazette*, published by authority, affords at least *prima facie* evidence that the publication in question is *The Dublin Gazette* referred to in the statutes I have mentioned; and the publication of the proclamation in which is thereby required. And for that proposition he relies on the case of *Rex v. Holt*, in which it was held that the production of *The London Gazette*, purporting to be printed and published by the King's printers, was, without any Legislative enactment on the subject, evidence of certain addresses presented to his Majesty, and of his answers thereto: this was decided on the authority of a case before Lord Holt, in which he decided it was a misdemeanour to publish a paper as from Royal

(a) 1 *Taylor on Ev.*, 4th ed. 46.

H. T. 1866. authority, which was not in fact, &c. No doubt *The King v. Holt*
Crim. Cases is a binding authority; and if, in the present case the paper
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THE QUEEN produced purported to be printed by her Majesty's printer, it would
v. have been, irrespective of the statute, evidence of the issuing of the
WALLACE. proclamation and the publication thereof in the official *Dublin Gazette*; but in our opinion that case does not apply to the present, in which the paper does not purport to be printed by the Queen's printers, or by the authority of her Majesty, or in fact by any particular authority. We cannot take judicial notice, or know by what authority it is in fact published, nor can we take judicial notice that because the paper is called *The Dublin Gazette* it must be the official paper of that name. We do not decide that it might not have been proved at the trial that the paper produced was in fact *The Official Gazette* published by the authority of the executive Government, or that evidence might not have been given by the production of the original proclamation that in fact such a proclamation was issued. We merely decide that the production of the paper in question was not *per se* sufficient for that purpose. We cannot take notice that it is in fact the official paper, more especially as the statute refers to the *Gazette* published by the Queen's printers, from which, if we are to draw any inference, that inference would be that it is only the official *Dublin Gazette* which is in fact published by the Queen's printers; though I may, from other sources of information, be aware that in fact the papers produced are in fact the only *Dublin Gazette* published.

PIGOT, C. B., KEOGH, CHRISTIAN, O'BRIEN, and HAYES, JJ.,
FITZGERALD, HUGHES, DEASY, BB., and O'HAGAN, J., concurred.

T. T. 1864.
Queen's Bench

LORD TALBOT DE MALAHIDE

v.

FINLAY WILLIAM CUSACK.*

(*Queen's Bench.*)

June 9, 24.

From the Master's certificate it appeared that:—This case was, in Hilary Term, 1863, referred by order of the Court to the Master to inquire into the several matters in dispute, and to take the accounts between the parties. The order of reference reserved to each of the parties liberty to apply to the Court or a Judge on any question of law or fact which might arise as to the allowance or disallowance of any particular item or items, and to take the directions of the Court or a Judge pursuant to the Common Law Procedure Amendment Act (*Ir.*) 1856, s. 7.

When the account was being taken, a witness, named Hugh Flood, was sworn on behalf of the defendant, and examined in reference to certain items of credit claimed by the defendant, especially with respect to items stated to bear date respectively on the 22nd of July and the 26th of August 1861; and to be entered in a certain book which was put into the hands of the witness while under examination, in order that he might, by reading those entries, refresh his memory.

The witness deposed that the book was in the handwriting of one Kinnelly, who still lives within a few miles of Dublin, and who had written it by witness's direction from books and memoranda given to him by the witness, who swore positively that he compared, sometimes at the time, sometimes the next day, every entry in the book produced with his own memoranda; that the memoranda-book contained every entry in the book produced; that those entries were the original entries made by the witness himself at the respective times when the transactions occurred, and while they were fresh in

Evidence.—A witness may refresh his memory by reference to entries in a book; which entries were made by another person under witness's directions, from documents written by witness at the time of the transactions, and which entries were regularly compared by witness with the original memoranda.

* Before O'BRIEN and HAYES, JJ.

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his memory; that he gave up to the defendant the labour-book and the diary-book, from which, and from the memoranda-book, the book produced was compiled; that some of the entries had been made two or three months after the transactions; that the original memoranda had been lost or mislaid; that witness did not know where they were, and could not produce them; that the memoranda-book did not contain any of the items in the labour-book or diary-book; and that he had not given up the memoranda-book to the defendant, or allowed him to see it.

The plaintiff's Counsel objected to the witness refreshing his memory by reading the entries in the book produced. The objection was based on the ground that, from the witness's evidence, it appeared that the entries in the book had been made by a man named Kinnelly, and not by the witness; and though copied by Kinnelly from books and memoranda in which the witness entered transactions at the times when they occurred, yet that the entries were not copied into the book produced while the transactions were fresh in the witness's memory, whose subsequent comparison of the entries in the book produced with the other books and memoranda, when the matters were not fresh in his memory, could not make the book produced a *quasi* original book, or anything more than a copy.

The Master, however, over-ruled that objection, on the ground that it appeared by the witness's evidence that the entries in the book produced were copied into it by Kinnelly from books and memoranda in which the witness from time to time made entries of transactions while fresh in his memory; and that the witness, at or shortly after the respective times when Kinnelly had copied same into the books produced, used to compare that book with the other books and memoranda.

From that ruling the plaintiff now appealed.

Chatterton, and *Leech*, for the plaintiff.

From the evidence it appears that the copy of the original documents was not made by the witness himself; or inspected by him sufficiently near the time of its making to entitle him to use it to

refresh his memory: *Jones v. Strand* (a); *Doe v. Perkins* (b).— T. T. 1864.
 [HAYES, J. In *Doe v. Perkins* the non-production of the original *Queen's Bench*
 document was not accounted for.]—*Burton v. Plummer* (c).— LORD
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 [O'BRIEN, J. There the entries were admissible as originals. But
 that case is not a decision that they would not have been admissible
 if they had not been made while they were fresh in the witness's
 memory.]—So far as the maxim "*Expressio unius est exclusio*
alterius" can apply, that case is a decision to that effect. The law
 is laid down to the same effect in 2 *Taylor on Evidence*, 4th ed.,
 p. 1195, ss. 1264, 1265; *Horne v. MacKenzie* (d); and *Beech v.*
Jones (e). The non-production of the original document has been
 sufficiently accounted for to allow to be given in evidence a true
 copy thereof, if the original was evidence *per se*. But the book
 produced does not satisfy the rule of law which requires the docu-
 ment to be made contemporaneously by the witness himself, or by
 some one under his inspection; or to be made at such a time that
 the witness can swear that it is correct. But the witness here did
 not swear that he, at the time when he saw this copy, had such a
 recollection of the facts stated in the books and memoranda from
 which it was compiled as would enable him to verify its correctness;
 he should be able to swear that the facts stated in the copy were
 true, to his own recollection; yet he has not even deposed that the
 facts were fresh in his memory at the time when the original docu-
 ments, of which the book produced is a copy, were written.

Carleton, for the defendant.

Tanner v. Taylor [cited in *Doe v. Perkins* (f).] The plaintiff
 in that case was non-suited because he had the original document at
 home; so that it is no authority on the point. The case of *Doe v.*
Perkins itself is an authority for the defendant, because it did not
 appear there that the extracts were true copies. In *Burton v.*
Plummer the second entry was an original, not a copy, because it
 was made while the facts were fresh in the witness's memory. The

(a) 3 C. & P. 196.

(b) 3 T. Rep. 749.

(c) 2 Ad. & El. 341.

(d) 6 Cl. & Fin. 628.

(e) 5 C. B. 696.

(f) 3 T. Rep. 754.

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observation there made by Patteson, J., in his judgment—"that the best evidence must be produced; and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or used merely to refresh the memory,"—must be taken *secundum subjectam materiam*; and meant that the best evidence in that case, though in existence, had not been produced.—[O'BRIEN, J. The second part of the judgment of Patteson, J., certainly qualifies the first part.]—In *Horne v. MacKenzie* (a) this point was not decided.

Leech, in reply.

A witness, who has sworn simply from comparison of the documents that the copy is correct, has ever been allowed to give the evidence tendered: if he had not when the document was written a memory of the thing, the use of the copy would be to create, not to refresh, his memory: *Burrough v. Martin* (b).

Cur. adv. vult.

T. V. 1864.
June 24.

O'BRIEN, J.

In this case, which was argued before my Brother HAYES and myself, we are of opinion that the Master's ruling was correct. It appears by his certificate that while Flood, a witness for defendant, was under examination as to certain items of account, a book containing certain memoranda was produced to him to refresh his memory as to those items. The memoranda were not in Flood's handwriting, but in that of one Kinnelly; and it was proved that they were exact copies of original entries made by Flood himself, in another book, at the time of the transactions to which they referred, and when they were fresh in his memory. Those entries were afterwards copied by Kinnelly into the book produced, and some of the copies were made two or three months after the original entries. The copies were not made in Flood's presence, but were from time to time compared by him with the entries which were in the original book in his own writing, and found to be correct; and the Master was satisfied that the copies in the book produced were correct. The non-production of the original book in which Flood

(a) 6 Cl. & Fin. 628.

(b) 2 Camp. 112.

had made the entries was accounted for by proving that it had been lost. Under these circumstances the Master ruled that Flood might look at the copies in the book produced to refresh his memory; and the plaintiff has appealed from that ruling.

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It has long been settled that a witness may, for the purpose of refreshing his memory, look at an entry in his own handwriting, made at the time of the transaction to which it refers, or shortly afterwards when the facts were fresh in his recollection. And this has been extended to the case of entries which, though not in the witness's handwriting, were either made in his presence, and read by him at the time of the transactions, or were read and examined by him shortly afterwards when the facts were fresh in his recollection, and when he was enabled to ascertain that the facts stated in the entries were true. These principles were not disputed by plaintiff's Counsel; but they contend that they do not apply to the present case, because the entries in question were not in Flood's handwriting: and it does not appear that, when he compared them with the original entries in his own handwriting, he had such a recollection of the facts as would enable him to ascertain at the time that the entries were true. Independent of authority upon this particular question, it appeared to us, that if a witness could (for the purpose of refreshing his memory as to any transaction) look at a document which, though not in his own handwriting, was read and examined by him either at the time of the transaction, or shortly afterwards when it was fresh in his recollection, there was no reason in principle why, when that original document had been lost, and its non-production accounted for, a similar rule should not apply to a document proved by himself to be an exact copy of the original, and to have been compared by him with it. Plaintiff's Counsel have referred to several cases which do not in my opinion govern the present, as the facts were materially different. In *Doe v. Perkins* (a) the original document, which was in the witness's handwriting, was not proved to have been lost; nor was its non-production accounted for. In *Tanner v. Taylor* (cited in the foregoing case, p. 754) the day-book, in

(a) 3 T. R. 751.

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which the witness made the original entry, was stated by the witness not to be lost, but to have been left by him at home; and even in that case Baron Legge stated the rule to be that, if the witness could swear positively from recollection to the fact in question, and only used the paper to refresh his memory, he might do so; but that if he could not from recollection swear to the fact further than finding it entered in the book, then the original should have been produced. Again, in *Beech v. Jones* (a), the book in which the original entry was made was the book of a private bank, for the non-production of which no reason was given. In *Burton v. Plummer* (b) the original entry was made by the plaintiffs in a waste-book, which was copied "day by day" into a ledger, in the presence of the witness, who checked it; and it was held that the entry in the ledger was in the nature of an entry made by the witness himself; it having been made in his presence, and checked by him with the waste-book from day to day; and that therefore the witness might refer to the ledger, even though the waste-book was not produced, or its non-production accounted for. Plaintiff's Counsel rely upon the observations of Mr. Justice Pateson in that case, where he states that, where the copy of an entry was not made by the witness contemporaneously, it was not admissible for the purpose of refreshing the witness's memory; but the reason assigned by the learned Judge for that opinion shows that it does not apply to the case now before us. He states:—"The rule is, that the best evidence must be produced; and that rule appears to be applicable whether a paper is produced as evidence in itself, or used merely to refresh the memory." In the case now before us the original document has been lost; and the best evidence in the power of the party, namely, a copy proved to be correct, has been produced. And the rule as laid down by Mr. Justice Pateson would imply that, where an original document, if produced, might have been referred to by a witness to refresh his memory, then the admissibility of a copy for that purpose rests upon the same principle as the admissibility of a copy of a document that would be evidence in itself, namely, that

(a) 5 C. B. 696.

(b) 2 Ad. & El. 343.

the non-production of the original should be accounted for, by proof of its loss, or otherwise. That rule therefore would rather support the Master's ruling in the present instance. There is, however, one case cited by plaintiff's Counsel—*Jones v. Stroud* (a)—where, in an action for slander, the witness stated that he could not find the original entry which he made at the time of the slanderous words complained of; that it was illegible; and that he made a copy six months afterwards; and where Best, C. J., held that the witness should not be allowed to refresh his memory by the copy. But it appears by the report of that case that the witness immediately afterwards produced out of his pocket the original entry; and it may be that Best, C. J., refused to allow the copy to be referred to on the ground that the non-production of the original was not satisfactorily accounted for, and without intending to lay down as a general rule that a copy could not be referred to, even though the loss of the original was proved. If, however, that case is to be regarded as an authority for such a rule, it is directly opposed by the decision of Lord Cranworth (when Baron Rolfe) in the case of *Topham v. M'Gregor* (b), which was not cited in the argument before us, but which my Brother HAYES has since referred to. In that case it appeared that a witness (A B) had written from time to time various articles for a newspaper editor, relative to the state of the weather, &c. The editor of the newspaper proved that an article in one particular newspaper produced was a correct transcript of the original manuscript sent to him by A B, and that such original manuscript had been lost. A B stated he had no recollection of having written that particular article, but that all the statements made in such article were true. It was proposed to read the article as evidence in itself, which was objected to. Baron Rolfe held that it was not admissible in evidence, but that it might be referred to by the witness A B, for the purpose of refreshing his memory. That case appears to us a clear authority in defendant's favour in that now before us.

On these several grounds we are opinion that the application to set aside the Master's ruling should be refused; and that the

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(a) 2 C. & P. 196.

(b) 1 Car. & K. 320.

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witness Flood should be allowed, for the purpose of refreshing his memory, to look at and use such of the entries in the book produced as the Master shall be satisfied are correct copies of original entries made by Flood in the original book, either at the time of the transactions to which such entries referred, or while such transactions were fresh in his memory.

HAYES, J.

I quite concur in the rule pronounced by my Brother O'BRIEN. I think he was correct in saying that, at the end of the argument, the feeling of both of us was with the defendant here, upon the reason and good sense of the matter. All that we desired to have was the support of an authority. I was fortunate enough therefore to lay my hand on the one referred to. There is no doubt that the original entry, if it could have been produced, might have been used "to refresh the memory of the witness." That is a very inaccurate expression, because in nine cases out of ten the witness's memory is not at all refreshed: he looks at it again and again, and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits; and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his entry. I do not see on what sound principles he should not be allowed to do the same thing, if it be proved to his satisfaction, especially after the original document has been lost, that the one before him is a true copy of it.

M. T. 1864.
Queen's Bench

WILLIAM GORRIE and others

v.

FRANCIS H. WOODLEY.*

Nov. 18.

DEMURRER.—Second count:—And the plaintiffs complain that an agreement in writing was made by and between the plaintiffs and the defendant, in the words and figures following, that is to say:—

“Haymount-house, Carrigtwohill, March 12th, 1864.”

“R. Meiklejohn & Son.

“Gentlemen,—Considering that you have employed William Fitzmaurice as your agent, I hereby agree and bind, and oblige as cautioner for the whole intromissions, actings, and doings of the said William Fitzmaurice as your agent; ‘it being understood however that the above cautionary obligation is not to exceed the sum of £100 sterling.—I am, gentlemen, your obedient servant, FRANCIS H. WOODLEY.”

And the plaintiffs aver that the persons in the said agreement described as R. Meiklejohn & Son are the plaintiffs, and the person described as Francis H. Woodley is the defendant; and that the plaintiffs did employ and appoint the said William Fitzmaurice as their agent; and afterwards from time to time, while he was so acting as their agent in the course of his employment, as such agent, supplied to the said William Fitzmaurice, in his capacity as agent as aforesaid, goods on credit; and there is now due to the plaintiffs from him as such agent, on account of the said goods, the sum of £98. 10s. 7d.—[general averment of the performance

A guarantee was entered into in the following terms:—
 “B M. & Son. Gentlemen,—Considering that you have employed W. F. as your agent, I hereby agree, and bind and oblige, as cautioner for the whole intromissions, actings, and doings of the said W. F., as your agent; it being understood however that the above cautionary obligation is not to exceed the sum of £100 sterling.—I am, gentlemen, your obedient servant, F. H. W.”

In an action by R. M. and Son against F. H. W., for goods supplied to W. F. as their agent, since the date of the guarantee—

Held, that the action lay.

Held also, that the terms were of themselves sufficiently intelligible.

The parties to whom the guarantee was given were named as R. M. & Son. In the plaint the plaintiffs were described as W. Y., C. H., and J. P., trading as R. M. & Son.

Held, that the names of the plaintiffs sufficiently appeared on the face of the guarantee.

* Before LEFROY, C. J., O'BRIEN, and HAYES, JJ.

M. T. 1864. of conditions precedent]—yet neither the said William Fitzmaurice
Queen's Bench nor the defendant has paid the said sum to the plaintiffs.

GORRIE
 v.

WOODLEY.

Demurrer thereto.*

W. O'Brien, in support of the demurrer.

Waters (with *Ezham*), contra. •

In this guarantee the words “considering that you have employed W. F. as your agent” do not necessarily import only an executed consideration. They may be fairly construed so as to imply a concurrent or an executory consideration. And if they are ambiguous, and capable of either construction, the Court must, “*ut res magis valeat quam pereat*,” give them that construction which will uphold the pleading; and on the trial parol testimony must be admitted, to show what was the real consideration upon which the parties contracted. In *Goldshede v. Swan* (a) the guarantee was in these words—“In consideration of your *having this day advanced* the sum of £750, we undertake,” &c.; and it was held that the instrument was sufficiently ambiguous to admit of evidence being given to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee. In

(a) 1 Exch. 154.

* The following points were noted for argument:—First; that there is no consideration shown for the alleged promise of the defendant; and the consideration, if any, is a past and executed consideration, not founded upon any request, and not capable of supporting the promise.

Second; that the terms of the writing in the count mentioned are insensible and unintelligible, and do not make any contract.

Third; that such terms are those of a foreign law; and their meaning, or the intention of the parties to create a contract of guarantee, is not shown by the count.

Fourth; that there is no sufficient memorandum or note in writing of the supposed contract, the names of the plaintiffs not being contained therein.

Fifth; that the alleged agreement does not extend to or comprehend the supposed breach.

Sixth; that it does not appear the defendant had any notice of the goods being supplied to the principal; and it is not shown that he knew of the nature or course of the agency business, or that the delivery of the goods on credit to the principal was within the course of said business; and that as a surety he ought not to be affected by the alleged breach.

Butcher v. Stewart (a) the terms of the guarantee were :—"In M. T. 1864.
 "consideration of your *having released* the above-named defendant *Queen's Bench*
 "from custody, I hereby engage," &c. The Court decided that that *GORRIE*
 agreement might be read to be, as it really was, prospective. The *v.*
 case of *Steele v. Hoe* (b) was also an action on a guarantee, in these *WOODLEY.*
 words :—"In consideration of your *having resigned* the office of,
 &c., I hereby agree," &c.; and Pateson, J., delivering judgment,
 said :—"We think that the words, in their ordinary acceptation, are
 "capable of expressing either a past or a concurrent consideration ;
 "and, as upon one construction the instrument is void, the other is
 "to be adopted which makes it valid. Therefore in several cases
 words which primarily, as in the present case, import only a past
 or executed consideration, have been construed as implying a con-
 current or future sense ; they should be so construed here. The
 words "considering that you have employed, I hereby," &c., may
 mean a concurrent consideration, viz., the appointment made con-
 temporaneously with the guarantee ; or a prospective consideration,
 namely, the continuance by the plaintiffs of the agent's employment.
 Subsequent averments in the plaint show that either one or other of
 these considerations was that upon which the plaintiff and defendant
 acted. It is averred "that the plaintiffs did employ and appoint the
 said W. F. as their agent." This averment points to an employment
 contemporaneous with the making of the promise by the defendants.
 Again, it is averred that "afterwards, from time to time, while he
 "was so acting as their agent, in the course of, &c., supplied to the
 "said W. F.," &c.; showing that W. F. was continued by the plain-
 tiffs in his employment as agent, and fairly suggesting that that
 continuance was the consideration for the contract of guarantee.
 At all events, these two averments raise sufficient ambiguity,
 touching the meaning which these words were intended to bear,
 to disable the Court from saying that they mean nothing but a past
 consideration ; and as the other two interpretations are possible, the
 Court, acting on the authority of *Steele v. Hoe*, will adopt that con-
 struction which will uphold the pleading : *Ruckley v. Kiernan* (c).

(a) 11 M. & W. 857.

(b) 14 Q. B. 431.

(c) 7 Ir. Com. Law Rep. 75.

M., T. 1864. On this point, *Colbourne v. Dawson* (a), *Bainbridge v. Wade* (b), *Queen's Bench* and *Hoad v. Grace* (c), were also cited.

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The terms of the writing are not insensible. The words "caution" and "cautionary" are known to the law, and mean "security," and "given as security:" *Fitzherbert's Nat. Brev.*, p. 63—Writ "*Cautione admittendâ*;" *Tomlins' Law Dict.*, tit. "*Cautione admittendâ*." The words "cautionary obligation" plainly mean obligation given as a security or guarantee.

This is not a foreign contract, but an Irish one. In the plaint the defendant is described as of Haymount-house, Carrigtwohill, in the county of Cork. There the contract was made, and so must be construed according to the *lex loci*.

Further, the plaintiffs' names are sufficiently set forth in the guarantee. In the title of the plaint they are stated as trading as Robert Meiklejohn & Son; the guarantee is addressed to R. Meiklejohn & Son; and there is a positive averment "that the persons described as R. Meiklejohn & Son are the plaintiffs."

The breach is well laid. The averment in the plaint that the plaintiffs, while W. F. was so acting "as their agent, in the course "of his employment as such agent supplied to the said W. F., in his "capacity as such agent as aforesaid, goods on credit," is equivalent to an averment that the nature and course of the agency was that the principals should supply goods on credit to the agent. It is not necessary to aver that it was his duty to pay for the goods. To raise an obligation of duty it is sufficient for the pleader to state the facts which create the duty; and the Court will then imply it from those facts: *Brown v. Mallett* (d); *Metcalf v. Hetherington* (e). From the facts stated here the Court will imply that it was the agent's duty to pay for the goods supplied; and the breach of non-payment by him is within the scope of the guarantee.

To aver notice of goods supplied to the principal debtor is not necessary: *Cutter v. Southern* (f), which decides that "if a man be "bound to another to indemnify him against the acts of a third

(a) 10 C. B. 765.

(b) 16 Q. B. 89.

(c) 7 H. & N. 494; S. C., 31 Law Jour., Exch. 98.

(d) 4 C. B. 615.

(e) 11 Exch. 271.

(f) 1 Saund. 116.

"person, no notice is necessary to be given by the obligee to the obligor of these acts." The objection that "it is not shown that the defendant knew the nature or course of the agency business, or that the delivery of goods on credit to the agent was within the course of said business," is untenable. It may be tested thus—the defendant could not plead that at the time of making the contract he did not know the nature or course of the said agency. Such a defence would be bad, on the principle that no man shall stultify himself by pleading incapacity. The defendant must be presumed to have known what he was doing when he entered into the contract.

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O'Brien, in reply.

Cur. adv. vult.

LEFROY, C. J.

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 Dec. 13.

In this case we are of opinion that the demurrer should be overruled. It is an action of contract, founded upon an agreement that, in consideration of Mr. Fitzmaurice being appointed as an agent, the defendant should become his security for any default which should occur in the course of his agency. Several objections were taken to the plaint, namely, that the contract was in the terms of a foreign law, and some others of no importance. But the main objection, and the only one that deserved any consideration, was, that the consideration stated was a bygone consideration. It appears however to be a principle established by the authorities that if, from the circumstances stated as attendant on or preceding the making of the contract, and which under the old rules of pleading might have been termed the *colloquium*, there is enough to show that the consideration, though apparently a past consideration, was in truth and reality a concurrent consideration with the promises upon which the party was sued, or the engagement under which he made himself liable, that would be sufficient to support the action. Cases to this effect were cited as decided in the Courts of Queen's Bench and Exchequer in England, establishing this principle beyond a doubt—that if, from the circumstances attending or preceding the contract, or appearing on the face of the contract itself, there is enough

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to show that the consideration, though apparently a past consideration, was in truth either an antecedent or a concurrent consideration, that is enough to make the defendant liable. Here the words were—"Considering that you have appointed such an one "your agent, I undertake to be his cautionary to the whole amount "of his defaults," and with a number of other liabilities. The very terms—"considering that you have appointed him your agent"—what do they mean? It would be no consideration if it had not been as a return for the appointment to the agency; and if therefore the appointment to the agency, or at least the agreement to appoint Mr. Fitzmaurice the agent, had not been concurrent, and formed the consideration for the defendant making himself liable for the agent's defaults, the transaction would have been nugatory. One rule laid down by the authorities is that, if the document is susceptible of a construction which will support the transaction, it should receive that construction; because it is not to be imagined that the parties would go through the form of entering into a contract which would be unavailing of itself; for it would be no consideration if it was a past consideration. Therefore, taking the very words—"considering that you have appointed him your agent,"—I come to the conclusion that what the facts state and the language would warrant one to assume is this, namely, that in consideration, and upon the consideration of your appointing him your agent, I will be his security for his faithful conduct; and finding that you have appointed him your agent, in pursuance of the arrangement made, I now become his cautionary. In short, as one case put it, it appears that each party was speaking; or the same thing would not appear a past transaction, or a transaction in reference to an antecedent occasion. One party says, "If you appoint him your agent, I will be answerable." The other says, "I have appointed him my agent; and therefore I look to you for his security." The transaction itself makes that apparently a past consideration, which was really the very motive and ground upon which the party made himself liable. Several cases were cited in which that principle of construction had been applied, and founded upon this rule of good sense, that the parties are not to be implied to have made a nugatory contract; for

if the consideration was a past one, it was no contract at all. Therefore, if we can do so reasonably, we must give to the words a construction which will support the contract.

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Upon these grounds it appears to me that we should overrule the demurrer, which alleged that there was no valuable consideration, as the consideration was past.

O'BRIEN, J.

I concur with my LORD CHIEF JUSTICE that the demurrer should be overruled. One ground of demurrer relied on is, that the contract as set out in the summons and plaint is unintelligible, by reason of terms of foreign law (viz., "*cautioner*" and "*intromissions*") being used in it, without any averment or explanation of their meaning. This objection cannot be sustained. It will be seen from some of the dictionaries, &c., to which we were referred, that one meaning of the word "*cautioner*" (even in the English language) is "security."—[See also *Fitzherbert's Natura Brevium*, p. 63, as to a writ for accepting caution.]—And it is clear upon the document itself, and without any other averment, that the word "*cautioner*" is used in this sense. With respect to the word "*intromissions*," its literal meaning in the English language is "the action of sending in." Its signification as a term of Scottish law is stated to be "intermeddling with the effects of another;" but, without averring or resorting to such latter meaning, the agreement is made perfectly intelligible by the use of the words "actings and doings" in immediate connection with the word "*intromission*;" and the clear meaning of the document is, that defendant was to be security to plaintiffs for the acts and conduct of Fitzmaurice as their agent. Another ground of demurrer has been relied on, which is still more untenable—namely, that the names of the plaintiffs are not contained in the agreement, and that, therefore, there is no sufficient memorandum in writing of the agreement to satisfy the Statute of Frauds. In answer to this objection, it is enough to refer to the summons and plaint, which sets out the agreement as addressed to "R. Meiklejohn & Son," and then states that plaintiffs

M. V. 1864. are the persons described in that agreement as "R. Meiklejohn and
Queen's Bench Son."

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Defendant's Counsel have however urged, as further grounds of demurrer, that the consideration stated in the agreement is a past consideration (namely, the plaintiffs' previous employment of Fitzmaurice as their agent), without averring that such consideration was moved, or the employment induced, by defendant's request; and that accordingly such consideration is not sufficient to support a contract for a guarantee. And Counsel further urge that the breach complained of in the summons and plaint (being in respect of goods supplied *after* the agreement) was not within the terms of the agreement, which did not relate to future supplies, or to the subsequent dealings between Fitzmaurice and plaintiffs. During part of the argument I entertained some doubt as to these objections; but I am now clearly of opinion that they also should be overruled. It is true, that in order to sustain an action on a guarantee, there must have been for it either a past consideration moved by the previous request of the guarantor, or else a concurrent or future consideration. Plaintiff's Counsel at first relied upon the 19 & 20 *Vic.*, c. 97, s. 3, under which it is no longer requisite that the consideration for a contract of guarantee should appear in writing; but it was afterwards conceded by Counsel that this provision would not affect the present argument. The statute dispensed with the necessity of such consideration appearing in writing, but not with the necessity of there being in fact good consideration for such a contract. And the summons and plaint before us does not contain any averment of consideration other than that which appears upon the document itself. Plaintiffs' Counsel accordingly contend that the consideration appearing on the document before us is a *concurrent consideration*. And I think that to be its true construction. We were referred, amongst other cases, to *Steele v. Hoe* (a), which is a strong authority in plaintiffs' favour. In that case a letter of March 1845, on which the plaintiff relied, was written to him by the defendant, as follows:—"In consideration of your having resigned the office of deacon, &c., I hereby agree to

(a) 14 Q. B. 431.

“hold myself responsible for the payment of £150, due to the Rev. M. V. 1864.
 “J. E.,” &c. &c. And it was contended, but unsuccessfully, that *Queen's Bench*
 the consideration appearing on that letter was insufficient, being a *GORRIE*
 past consideration without request. Pateson, J., in delivering the *v.*
 judgment of the Court, stated :—“ We think that the words in their *WOODLEY.*
 “ordinary acceptance are capable of expressing either a past or a
 “concurrent consideration ; and as upon one construction the in-
 “strument is void, the other is to be adopted which makes it valid.
 “The expression that a promise is founded upon a consideration
 “conveys the notion that the consideration precedes the promise in
 “the mind of the party making the promise—he promises because
 “the consideration exists : and this form of expression is shown by
 “the authorities to have been frequently used when the considera-
 “tion and the promise are concurrent. Each side of a contract is
 “consideration or promise, according to the party speaking of it ;
 “and if each party were to put into writing his own promise, each
 “side of the contract would in turn appear to have preceded the
 “other, though both formed one agreement ; the plaintiff might
 “write, ‘you having guaranteed, I resign ;’ and the defendant,
 “‘you having resigned, I guarantee.’” He then referred to pre-
 vious decisions, to show that the construction he stated should be
 adopted, being one of which the document was capable, and the
 presumption being that the parties did not intend their act should
 be void. He also stated that extrinsic evidence was not required for
 such construction, but would be requisite for the party alleging that
 the instrument ought to be held void. It appears to me that the
 decision and principles of that case govern the present. The form
 of expression in the document before us, “considering that you
 have employed W. Fitzmaurice as your agent,” is (as regards the
 question of past or concurrent consideration) almost identical with
 the form used in the letter in *Steele v. Hoe* ; and there were more
 grounds for implying a past consideration in that case, where the
 subject-matter was the resignation of an office, than in the present,
 where the consideration—namely, the employment of an agent—is to
 a certain extent of a continuing character. It may well be said in
 the present case (for reasons similar to those put by Mr. Justice

M. V. 1864. Pateson with respect to that before him), that the document should
Queen's Bench be construed as importing, on plaintiffs' part, the statement, "You
 GOBBIE having guaranteed, I employ;" and on defendant's part, the state-
 v. ment, "You having employed, I guarantee."
 WOODLEY.

With respect to the objection that the guarantee given by the agreement before us did not refer to the future actions or doings of Fitzmaurice as plaintiffs' agent, and that accordingly the breach relied on was not within the agreement, I think it clear, upon the document itself, that it includes such future transactions. This indeed almost necessarily follows from holding that plaintiffs' employment of Fitzmaurice as agent was a concurrent consideration, from the very subject-matter of the guarantee—namely, Fitzmaurice's *actions and doings* as such agent. It is also to be implied from the provision that the obligation "was not to exceed the sum of £100." In the case of *Bainbridge v. Wade (a)*, where the guarantee relied on was in these terms: "Sir,—I hereby "guarantee the payment of any sum or sums of money due to you "from Mr. A. L. of R, the amount not to exceed at any time the "sum of £100," it was held by Lord Campbell, Coleridge, J., and Wightman, J., that the document itself, without resorting to any extrinsic evidence, should be construed as referring to future debts; and the provision limiting the amount to £100 was relied on in support of that construction. Again, in the case of *Hoad v. Grace (b)* the guarantee sued on was as follows: "Gentlemen,— "As Mr. D. informs me you require some person as guarantee for "goods supplied to him by you in his business, I have no objection "to act as such for payment of your account;" and the Court were of opinion that the guarantee was one for goods "to be supplied;" and that the words "payment of your account" meant "your account when you have supplied the goods."

It has been also objected by defendant's Counsel, that it does not appear from the summons and plaint that the defendant knew of the nature or course of the agency business; or that the delivery of goods to the agent on credit was within the course of business; or that the defendant had any notice of the goods being so supplied. But

(a) 16 Q. B. 89.

(b) 7 H. & N. 494.

the summons and plaint states that, in the course of Fitzmaurice's employment as agent, the goods were supplied to him on credit, in his capacity as agent. And I think this statement sufficient to bring the case *prima facie* within the terms of the guarantee. If the supplying of goods on credit, and Fitzmaurice's duly accounting for them to the plaintiffs, was not properly within the course of the agency business, or of Fitzmaurice's employment as agent, the defendant should have raised that question by plea or traverse. But if in fact such supplying of goods was within said agency business or employment, I see no grounds whatever for contending that defendant's liability on his guarantee would be avoided either by his ignorance of the nature or course of such business, or of the supplying of goods on credit, or by the fact of his not having got notice of the goods being so supplied.

In my opinion, therefore, all the grounds of demurrer relied on are unsustainable.

HAYES, J.

It has been objected to the plaintiffs' pleading that the contract on which he relies has not been set out according to its legal effect, but *in hæc verba*. On that point I cannot do better than cite the expressions of Joy, C. B., in *Dawson v. Baldwin* (a):—"The plaintiff, it is said, has not stated the covenant on which he has brought his action; but he has stated a covenant in the words used in the lease, from which that other covenant is sought to be implied, and it is insisted that this is not enough; that the plaintiff ought to have set out the covenant on which he relies, not in the words used, but according to its legal effect as a general principle; that is quite correct. But still, it is not necessary to state the legal effect of a covenant, if that be apparent from the words. If it be presented to the mind of the Court, that this is the covenant on which the party sues, it is not necessary also to aver that it is that which the Court sees it must be."

It is well settled also that, in order to arrive at the true meaning of a contract, we may look not only at the words of the contract, but

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(a) Hay & Ir. 24, 31.

M. V. 1864. at the situation and circumstances of the parties at the time at
Queen's Bench which it is entered into as appearing on the face of the pleading
 GORRIE demurred to: *Bainbridge v. Wade*. It is true that the words
 v. in the guarantee, "Considering that you have employed Mr.
 WOODLEY. Fitzmaurice as your agent," might, standing by themselves, be
 understood as referring to a bygone transaction; but when I find
 that in the very next sentence the pleader states that the plaintiffs
 "did employ Fitzmaurice as their agent, and did afterwards, from
 "time to time while so acting as their agent, supply him with goods
 "on credit," I am led to the conclusion that the guarantee and the
 employment were parts of the same transaction, and that it was not
 until after Fitzmaurice had filled the position of a guaranteed agent
 that the goods were supplied to him.

I am, therefore, of opinion that the point ought to be ruled
 for the plaintiff.

NOTE.—As to continuing guarantees, see *Wood v. Priestner* (2 L. R., Ex. 66).

MICHAEL MURPHY and CHARLES HENRY JAMES,
 Official Assignees, and JAMES WHELAN, Trade Assignee of
 JOHN SKELLY a Bankrupt.*

M. V. 1863.
 Dec. 17, 19.

H. V. 1864.
 Feb. 17.

v.
 JOHN KEEFE.

DEMURRER.—The first count of the summons and plaint was in
 The defendant obtained a trover, for the conversion by the defendant to his own use of the
 warrant of at- goods of the plaintiffs, as assignees of John Skelly.
 torney to con-
 fess judgment
 against A, but
 did not file the warrant pursuant to 20 & 21 Vic., c. 60, s. 334. Defendant marked
 judgment within twenty-one days after the execution of the warrant, duly registered
 said judgment, and levied the amount of his debt by writ of *fi. fa.* Subsequently A
 became a bankrupt, and his assignees sued defendant to recover the goods.

Held (*dissentiente* FITZGERALD, B.), affirming the judgment of the majority
 of the Court of Queen's Bench, that the assignees could not recover.

* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

Second count:—Trover, for the conversion by the defendant to his own use of the goods of John Skelly, before he became a bankrupt, to the damage of the plaintiffs, as such assignees, of £1000.

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Third count:—Trespass, for seizing and taking the goods of John Skelly, before he became a bankrupt, and carrying away and disposing of those goods to the defendant's own use, to the damage, &c.

Fourth count:—Detention of the goods of the plaintiffs, as such assignees.

Fifth count:—Common count for money had and received by the defendant for the use of the plaintiffs.

Defence (pleaded separately to each count):—That, before the commission of the said acts complained of, or any of them, and before the said John Skelly had been adjudged a bankrupt, he the defendant theretofore, to wit, on the 5th day of April 1862, and in or as of Hilary Term 1862, by the consideration and judgment of her Majesty's Court of Common Pleas in Ireland, to wit, at Dublin, recovered against the said John Skelly a certain debt of £1207. 0s. 4d., besides £2. 2s. 8d. damages, by reason of the detaining of said debt, together with £1 costs of registration, as by the record of said Court appears; and which said judgment was duly entered in the said last-mentioned Court on the day next after the execution of the bond and warrant attached, and afterwards duly registered pursuant to the Act of the 7 & 8 Vic., c. 90; and the defendant avers that, afterwards and before the said John Skelly became or was adjudged a bankrupt, and whilst he was in possession of the said goods and chattels, to wit, on the 17th day of February 1863, he the said defendant, in order to obtain payment of the said judgment, which was in full force and unsatisfied, sued out a certain writ of our Lady the Queen, and called a writ of *fi. fa.*, directed to the Sheriff of the county of the city of Dublin, whereby the said Sheriff was commanded, &c., and which said writ was afterwards, and before the delivery thereof to the Sheriff, marked to levy £546. 12s. 10d., certified to be due on foot of the said judgment. And the de-

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defendant avers that afterwards, and before the said John Skelly became a bankrupt, to wit, on the 17th day of February 1863, said writ was delivered to the Sheriff to be duly executed; and thereupon, by virtue of said writ, and in due execution thereof, the said Sheriff did afterwards, and before the said John Skelly became a bankrupt, to wit, on the 17th day of February 1863, in order to levy the moneys by the said indorsement on said writ directed to be levied, lawfully seize and take in execution certain goods and chattels of the said John Skelly, then being and found within his bailiwick; which said goods and chattels so seized are the same and the only goods in the summons and plaint mentioned. And the defendant avers that, afterwards, by virtue of the said writ, and in due execution thereof, and before the filing of any petition in bankruptcy against the said John Skelly, the said Sheriff sold the said goods and chattels in the said plaint mentioned, and by such sale made and levied the sum of £383. 5s. 3d. towards satisfaction of the said debt, damages, and costs aforesaid; and that, before or at the times of the said seizure and sale, or either of them, the defendant had not any notice of any prior act of bankruptcy by the said John Skelly committed. And the defendant avers that the said judgment was, at the said last-mentioned times, and still is, in full force and effect, and that the said goods and chattels so seized as aforesaid are those mentioned in the plaint; and that the moneys levied under and by virtue of said writ were all paid to the defendant long previous to the filing of the said petition under which the plaintiffs were so appointed assignees as aforesaid, and before the bankruptcy; which are the said several causes of action in the plaint complained of.

And the defendant avers that, save as aforesaid, and by causing the said writ of *fi. fa.* to be so sued forth as aforesaid, and thereby causing the said goods to be sold thereunder, as he lawfully might, as aforesaid, he in nowise committed the said acts so complained of in the said summons and plaint; nor did he receive any money for the use of the said Michael Murphy, Charles Henry James, and James Whelan.

Replication:—That the writ of *fi. fa.* in the said defence men-

tioned was sued out upon a judgment entered up on the 5th day of April 1862, by the said defendant against the said Skelly, upon and by virtue of a certain warrant of attorney to confess judgment in a personal action, executed to the defendant by the said John Skelly after the passing and commencement of the 20 & 21 Vic., c. 60, to wit, on the 4th of April 1862; and the plaintiffs aver that the said warrant of attorney, or a true copy thereof, and of the attestation thereof, was not within twenty-one days next after the execution of the said warrant of attorney filed, together with an affidavit of the time of the execution thereof, with the proper officer in her Majesty's Court of Common Pleas in Ireland, in which Court the said judgment was entered up on the said warrant of attorney. And the plaintiffs aver that a petition of bankruptcy was duly filed against the said John Skelly in the Court of Bankruptcy and Insolvency in Ireland, upon which petition the said John Skelly was afterwards, to wit, on the 20th day of March 1863, duly adjudged a bankrupt. And the plaintiffs aver that, by reason of the premises, *the said warrant of attorney was and must be deemed and taken to be null and void, and of no effect in law; and the said judgment so entered up under and by virtue thereof, and also the writ of fi. fa. in said defence mentioned, as well as the sale thereunder, were and must be deemed and taken to be also null and void to all intents and purposes whatsoever.*

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To this replication the defendant demurred, and the principal points noted for argument were the following:—

That, as it is admitted by the replication that the judgment was duly registered pursuant to the provisions of the Irish Bankrupt and Insolvent Act 1857, in the proper office of the Registrar of Judgments, within twenty-one days from the execution of the said warrant and the entering and signing of said judgment, it was not imperative on the defendant to have filed, when filing the warrant, any affidavit stating the time of its execution.

That the replication avers no facts from which it can be necessarily inferred that the said judgment and writ of *fi. fa.*, admittedly valid and in force as in the defence stated, have become by reason of the bankruptcy void.

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That the replication does not show that Skelly was at any time a trader, or subject to the bankrupt laws; or that the said judgment or writ of *fi. fa.* have been by any order set aside.

That the warrant of attorney had been duly acted on and exhausted, and all the acts justified by the said defence done, and the moneys therein mentioned received, long before the adjudication in the replication mentioned.

That even if the judgment became void, yet as no demand of the proceeds [has been made on the defendant, or averred, plaintiffs cannot now sustain any of the counts in the plaint, and should have brought a special action on the statute.

That the plaintiffs do not by the replication maintain their plaint in each and every count.

P. Martin and Heron, in support of the demurrer.

The bankrupt's assignees contend in substance that every judgment creditor who obtained a judgment on foot of a bond and warrant of attorney is bound, not merely to enter up and register such judgment within twenty-one days from the time of the execution of the bond and warrant, but that he is also bound, at the time of filing the warrant, to file an affidavit, stating that which is apparent on the face of the warrant itself, namely, the time of the execution of that warrant. If that doctrine be established, it will place creditors and Sheriffs in great danger; for the assignees contend that, though execution on such a judgment may have been completed by sale and payment long before any act of bankruptcy, yet the bankrupt and his assignees may at any distance of time afterwards turn upon the creditor and sue him and the Sheriff, in trespass or trover, for acts committed under the *fi. fa.* while it was in full force. The 3 & 4 *Vic.*, c. 105, ss. 10 to 15, show that the Legislature's object, in respect to warrants of attorney, was to prevent a trader appearing to be wealthier than he really was, and being thereby enabled to contract debts upon false appearances; and, as a remedy that Act provides that warrants of attorney shall be void as against the general creditors of the cognizor at the end of twenty-one days, unless the holder of the warrant has used it so as

to exempt it from being what the statute calls a "secret" warrant—*i. e.*, unless he has filed it or entered judgment upon it within the space of twenty-one days, and registered it, so as to thus give notice to the whole world of its existence. On reading these sections, before referred to, of the 3 & 4 *Vic.*, c. 105, which is in nowise repealed in connection with sections 334, 335, and 336 of the present Irish Bankrupt and Insolvent Act, it is clear the law remains the same as it was, and no change therein was intended; the object of both is to guard against secret warrants.

The present Bankrupt Act has, however, it may be said, eased the creditor in this way. Section 334 enables him to file, if he pleases, an affidavit stating the time of the execution of his warrant, and then not to at once enter up his judgment; but by thus filing his warrant, with an affidavit, to give the world notice of the existence of the debt, and of the position of the trader who is his debtor. The plaintiffs, however, seek to construe section 334 alone and without the light thrown upon it by the previous Act, and the other sections which follow in the present Act; and they say it re-enacts by the words of incorporation "*in manner and form* provided by the Act" 3 & 4 *Vic.*, c. 105, s. 12, the necessity of filing, at the same time with the warrant of attorney, an affidavit stating the time of the execution of the warrant; and that if this be not done they contend that, though at the time when the debtor gives the warrant he may not be a trader, or subject to the bankrupt laws, yet, if after a time he becomes a trader and then a bankrupt, his assignees have a right to treat such warrant, and any judgment entered up thereon, as absolutely null and void *ab initio*, and to sue as trespassers any persons who may have issued or acted under any writ of execution thereon levied, perchance ten years, before the accruer of their title; nay, further to sustain their pleadings, they must show that the omission to file the affidavit of the time at which the warrant was executed, makes the warrant null and void even as against Skelly. There is, however, an unbroken chain of authority showing that the words "fraudulent, null, and void," in that 334th section, must be read as being so merely *as against the assignees*. The 3 *G.* 4, c. 39, s. 4, has received a similar interpretation:

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The doctrine laid down in these cases has been sanctioned by the provisions of the 7 G. 4, c. 57, s. 33. There has been a like decision on similar words in the 3 & 4 Vic., c. 145, s. 13: *Conlan v. M'Anaspie* (d). The analogous provision of the 12 & 13 Vic., c. 106, s. 137, which is far stronger than the section of the Irish Bankrupt Act, as it does not contain the word fraudulent, has also been made the subject of a recent decision: *Bryan v. Child* (e). The 20 & 21 Vic., c. 60, s. 334, contains the word "fraudulent," the insertion of which shows that even, without any authority on the subject, that the warrant, as Alderson, B., says in *Bryan v. Child*, cannot be void as against the trader himself. That section must be read "fraudulent, null, and void," as against the assignees; and, adopting that construction of the statute, the assignees have no right of action under the circumstances conceded in this case. The judgment was obtained with Skelly's assent on a warrant of attorney, and the execution was completed long before any act of bankruptcy was committed. The assignees cannot maintain this action unless they had a right to the possession of the goods, or the possession itself. They have not any constructive possession under the statute, which means, not that the warrant shall be absolutely void, but that it is voidable in the election of the assignees. Such words must always be construed in ease of the public. The first class of cases on this subject are on ecclesiastical leases: *Lincoln College's case* (f), collected in *Malins v. Freeman* (g); *Rex v. The Inhabitants of St. Nicholas in Ipswich* (h). The cases in which similar words have also been construed to mean voidable, even in cases of contract and policies of insurance will be found in *Armstrong v. Turquand* (i). The principles upon which fraudulent preferences come within the bankrupt laws are strongly in favour of the defendant. When a fraudulent preference has been given, the

(a) 6 B. & Cr. 446.

(b) 10 B. & Cr. 500.

(c) 7 Bing. 154.

(d) 10 Ir. Law Rep. 295.

(e) 5 Exch. Rep. 368.

(f) 3 Rep. 53 a, and 58 a.

(g) 4 Bing., N. C. 395.

(h) Burrow's Set. Cas. 91.

(i) 9 Ir. Com. Law Rep. 44.

property is not divested out of the transferee until the assignees elect to treat the preference as fraudulent, and such election has no relation back so as to avoid it *ab initio*: *Stevenson v. Newenham* (a). Other cases also establish that the property passes in the subject-matter and vests, and the assignees acquire a title only from the time at which they made the demand, then and not till then is the property divested: *Morewood v. South Yorkshire Railway and River Dun Co.* (b). So, in the present case, before the assignees could make any election, the sale was complete, and the property was gone. The transaction was not void *ab initio*. The title of the assignees flows only from the statute. They took nothing but the bankrupt's property, and his rights of action in relation thereto. If the judgment was void as against the trader himself—that is to say, as against the whole world—the assignees have his right of action, but even then they cannot succeed on these pleadings. Assignees cannot maintain trover for goods converted before any act of bankruptcy was committed: *Brook v. Mitchell* (c). In that case, though in it a right of property was expressly vested in the assignees under the express words of the 3 G. 4, c. 39, it was held that they could not recover; and there it was averred the debtor was a trader at the time of the execution. The construction contended for by the plaintiffs opens the door to frauds, as, suppose seven years elapsed between the completion of the execution and the bankruptcy. The judgment creditor, being barred by the Statute of Limitations, could not prove for his debt. The right of action vested in the assignees would, however, enable them to recover, and if the debtor's estate produced anything beyond 20s. in the £1, the surplus would go to the bankrupt, and the original creditor would be defrauded. In *Brook v. Mitchell* it is suggested, that if the assignees had any remedy it was only by a special action in case upon the statute. When title of assignees arises, they may take the property if it be in existence; but if sold, they have no remedy—*per* Lord Wensleydale, in *Billiter v. Young* (d). The decision in

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(a) 13 C. B. 302.

(b) 3 H. & N. 798.

(c) 8 Scott, 739; S. C., 6 Bing., N. C. 349.

(d) 6 Ell. & Bl. 1.

M. V. 1863. *Young v. Billiter* (a) overrules the previous decision of the majority of the Exchequer Chamber in England in the last cases; and the principles laid down in that case of the Lords clearly establish the principles before contended for, and show this action cannot be maintained. Even on the strictest and most literal construction of the statute, the warrant of attorney does not become void until the end of the twenty-one days; so that a judgment entered upon it, as here, before the warrant has spent its force, must be good and in force, as averred in the defence. It has been decided upon analogous words of the Bill of Sales Act, in *Banbury v. White* (b), that, though the bill of sale be bad from defective registration, a sale had within the twenty-one days is good. The first count, which avers that the property is in the assignees, cannot be maintained, because that property was sold and converted long before the bankruptcy; and it is thereby assumed that the property, and not the right of action, vested in them. The second count relies upon a cause of action perfect and complete in the time of the bankrupt. But the facts stated in the defence show that the acts were done with his leave and license. The third count, in trespass, supposes an act wrongful at the time when it was done. But it cannot be supposed that the acts were illegal as against the bankrupt himself; for the defendant only put in motion a Court of competent jurisdiction. The fourth count charges the defendant with detaining goods which never came into his possession at all. Then, the first objection to the count for money had and received is, that it does not say that the money was had and received to the use of the plaintiffs as assignees.—[FITZGERALD, J. They sue as assignees, and only in that character.]—Well, then, the substantive objection to the count is, that, if the act was not wrongful as against the assignees, the money was not received to their use: *per* Cresswell, J., in *Billiter v. Young* (c).—[FITZGERALD, J. Does not your argument come to this, "true it is that the warrant and judgment are void as against the assignees, yet they get no benefit from that circumstance?"]—It might have happened that the property was in the possession of

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(a) 8 H. of L. Cas. 682.

(b) 11 W. Rep., Exch. 785; S. C., 2 H. & C. 300.

(c) 6 El. & Bl. 27.

the Sheriff at the time when the bankruptcy occurred, and that he executed a bill of sale to the trader. On an application made to the Court to set aside the judgment, on the ground that the warrant was void, the assignees might obtain relief—[FITZGERALD, J., referred to the 20 & 21 *Vic.*, c. 60, s. 330.]—Certainly that section shows that there might be serious inconvenience if the trader does not file the affidavit at the time he files the warrant. The case of *Nicholson v. Gooch* (a) shows that the money must, *at the time when it was received*, bear the character of money had and received to the use of the assignees. If such a count would lie at all, it would be for money had and received to the use of the bankrupt; and, as his right of action would pass to the assignees, it might be contended perhaps that they had a right to sue, according to the decision in *Brook v. Mitchell* (b). But that decision turned on the construction of the section of the *English Act* (3 *G.* 4, c. 39), which is different from the Irish one. Again, on these pleadings the plaintiffs cannot rely on the count for money had and received; they have based their case in tort really. The defendant has traversed the count in tort. The plaintiffs have filed a general replication to all the defences, and it must support each and every count in the plaint.—[O'BRIEN, J. It may be taken distributively. We have decided that, in the case of *Mercer v. O'Reilly* (c), in the Court of Exchequer Chamber. The replication is to be considered as separately applicable to each count or defence.]—All the English authorities show that if a general replication fails to sustain any one count, the whole replication is bad: *Ch. Plead.*, 7th ed., p. 754; *Com. Dig.*, tit. *Pleader, Replication*, F. 25; *Trueman v. Hurst* (d).—[O'BRIEN, J. Does not the 20 & 21 *Vic.*, c. 60, s. 334 incorporate the 3 & 4 *Vic.*, c. 105, s. 13?—FITZGERALD, J. Do not the words "in manner and form," &c., incorporate the provision rendering it necessary to file the affidavit, as well as the warrant?—Yes, but then section 334 deals with warrants and cognovits; so that, if the plaintiffs' construction is true, cognovits would be void though

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(a) 5 El. & Bl. 999.

(b) 8 Scott, 739.

(c) 13 Ir. Com. Law Rep. 153.

(d) 1 T. Rep. 40.

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Meldon, and C. R. Barry, contra.

The object of the 20 & 21 Vic., c. 60, was to prevent one creditor gaining, by a secret arrangement with the common debtor, an advantage over the other creditors. In order to secure publicity, section 334 requires, not only that any defeasance shall be written on the same paper as the warrant, but that the warrant of attorney shall be void unless filed within twenty-one days next after the execution thereof *in manner and form* provided by the 3 & 4 Vic., c. 105, s. 12; that is to say, unless, along with the warrant of attorney, there is filed an affidavit of the time of the execution thereof. The analogous Act in England has been construed with great strictness: *Dillon v. Edwards* (a); *Acraman v. Herniman* (b). The words of sections 333 and 334 being the same in this respect, the judgment is void as well as the warrant of attorney: *Orr v. Devin* (c), so that trover will lie; and can be maintained by the assignees against the execution creditor: *Rush v. Baker* (d). No demand is necessary; *Summersett v. Jarvis* (e); nor is it necessary to aver in the pleadings a demand and refusal; *Nixon v. Jenkins* (f). Sections 334, 335, and 336 deal with three distinct classes of things, and put them on different footings. By section 334 the transaction, though completed before the act of bankruptcy, is made void *ab initio*. Nor is *Billiter v. Young* (g) a decision against the plaintiffs, because the Act on which that case was decided made the warrant void only *as against the assignees*, whereas section 334 makes it "fraudulent, null, and void to *all* intents and purposes *whatsoever*." These words cannot be construed to mean "voidable at the election of the assignees;" but to each word must be given its own meaning, even though inconveniences may result thence: *Warburton v. Loveland* (h); ap-

(a) 2 M. & Payne, 550.

(c) 9 Ir. Com. Law Rep. 100.

(e) 3 Br. & Bing. 2.

(g) 6 El. & Bl. 1.

(b) 16 Q. B. 998.

(d) 2 Str. 996.

(f) 2 H. Bl. 135.

(h) 1 H. & Br. 648.

proved of in *Grey v. Pearson* (a). Section 334 describes a well-known species of security—namely, a *general* warrant of attorney to confess judgment in any personal action. The language of section 336 may be large enough to embrace *all* judgments, but could not over-ride the precise and positive words of section 334, unless it said that all judgments duly registered should be held valid. If the defendant is right in his contention, it is only necessary to register the judgment within twenty-one days, though the judgment-creditor might all that time have in his pocket the defeasance, the concealment of which the statute meant to guard against, lest it should be used for purposes of improper preference, or be produced only to save the property from being swallowed up by the bankruptcy. Section 335 applies to cases in which a plaint has been in fact issued, either *bona fide* or in order to evade the provisions of section 334. *Farrow v. Mayes* (b) is an express authority that the count for money had and received will lie.—[FITZGERALD, J. That case was decided before *Billiter v. Young* had gone to the House of Lords.]—Yes, but *Billiter v. Young* was conversant with a *voluntary* conveyance to secure an antecedent debt, which it was not wrong for the grantee to take, nor had he to do any act in order to complete his title. But here the defendant was bound to comply with the statute, by filing the affidavit along with the warrant of attorney. Besides, *Billiter v. Young* only bears on the counts in trover.—[FITZGERALD, J. With reference to the present case, *Billiter v. Young* is valuable only for certain *dicta*, not for the decision.]—Again, section 334 is substantially the same as the 12 & 13 *Vic.*, c. 106, s. 136, which has the same effect as the previous enactments, save that it contains no exception in favour of judgments entered up within the twenty-one days: *Arch. Bank.*, 11th ed., p. 334; *Shelf. Bank.*, 3rd ed., p. 335. Then, section 336 is a general provision, to the effect that *all* judgments, no matter how obtained, must be registered within the twenty-one days, except where the warrant of attorney has already been duly filed.—[HAYES, J. Section 334, though it levels the warrant, if not duly filed, says nothing about the judgment entered up

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(a) 6 H. of L. Cas. 76.

(b) 18 Q. B. 516.

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thereon. But does not section 336 prostrate the judgment also, and thus apply to *all* cases except these of judgments entered upon warrants of attorney duly filed?—The language of section 334 is positive, and would be without meaning unless the judgment entered up on the void warrant was itself also void. That the proceeds of the execution were paid over prior to the act of bankruptcy does not protect the defendant: *Biffin v. Yorke* (a).

Heron, in reply.

Sections 335 and 336 gave to the assignees a statutory right to bring an action for money had and received, so that it cannot have been contemplated by section 334; and the Sheriff and execution-creditor were not trespassers *ab initio*, so that trover would not lie at all unless the right to bring that action was expressly created by statute. In the three cases cited, *Morris v. Mellin* (b), *Bennett v. Daniel* (c), and *Conlan v. M'Anaspie* (d), as well as in *Doolan v. Reynolds* (e), the question came before the Court, not upon demurrer, but upon a motion to set aside the judgment; and the reason why the question arose in that form is, that trover and trespass do not lie at all. Those cases were followed by *Aireton v. Davis* (f). After the bankruptcy, the assignees cannot recover in trover, if the bankrupt himself could not impeach the transaction, unless the delivery took place after the bankruptcy: *Wilson v. Whitaker* (g); *Ward v. Clarke* (h). Where the sale takes place before the bankruptcy, the execution-creditor has not a security for his debt under section 329: *Whitmore v. Greene* (i). Trover will not lie unless the act of bankruptcy took place before the conversion: *Cooper v. Chitty* (k): neither will trespass lie: *Smith v. Mills* (l). An action by assignees for money had and received will lie only where it is expressly given by statute, as in sections 335, 336;

(a) 5 M. & Gr. 428.

(c) 10 B. & Cr. 500.

(e) 6 Ir. Com. Law Rep. 233.

(g) Moo. & Mal. 8

(i) 13 M. & W. 104.

(b) 6 B. & Cr. 446.

(d) 10 Ir. Law Rep. 295.

(f) 9 Bing. 740.

(h) Moo. & Mal. 497.

(k) 1 W. Bl. 65.

(l) 1 T. R. 475.

or where the act of bankruptcy took place prior to the receipt of the money, in which case it is money received to the use of the assignees; *or* where the assignees, being entitled to sue in trover or trespass, waive the tort, and elect to sue for money had and received. With the exception of *Farrow v. Mayes* (a), which however was upon a special case, and was subject to the same infirmity as *Acraman v. Herniman* (b)—namely, that in the English Act there were not any sections corresponding to 20 & 21 Vic., c. 60, ss. 335 and 336. The only case in which the assignees have succeeded on a count for money had and received is *Hitchin v. Campbell* (c); but there the *fi. fa.* had issued subsequently to the act of bankruptcy. In *Netley v. Buck* (d) the Sheriff sold the goods after the act of bankruptcy had been notified to him; and the Court held that the tort might be waived, and that an action for money had and received lay. *Dillon v. Edwards* (e) was a case of the same character. In cases of fraudulent preference the assignees can sue in trover: *Pennell v. Aston* (f).—[FITZGERALD, J. Not if the act was, paying money in cash.]—Even then they may sue in trover.

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Cur. adv. vult.

FITZGERALD, J.

The question in this case was argued before us on the 17th of December last, and arose on a demurrer to the replication, involving the construction of the 334th section of the 20 & 21 Vic., c. 60 (the Irish Bankruptcy and Insolvency Act).—[The learned Judge here stated the pleadings; and, having read the 334th section, proceeded]:—

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The main question seems to be whether, according to the true construction of section 334, the warrant of attorney in question, and the judgment entered on it, are severally null and void in consequence of the warrant not having been *duly* filed within twenty-one days after its execution, notwithstanding that the judgment was entered on the warrant within the twenty-one days, and

(a) 18 Q. B. 516.

(b) 16 Q. B. 998.

(c) 2 W. Bl. 827.

(d) 8 B. & Cr. 160.

(e) 2 M. & Payne, 550.

(f) 14 M. & W. 415.

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was registered pursuant to the 7 & 8 Vic., c. 90, within twenty-one days after entry?

Mr. *Martin*, who argued the case on the part of the defendant, in a clear, close, and comprehensive argument, contended in the first instance that although the words of the 334th section are "*shall be deemed fraudulent, null, and void, to all intents and purposes whatever,*" yet that, on the true construction of that section, it renders the transaction void or voidable only as against the assignees in bankruptcy or insolvency representing the rights and interests of the general creditors; and in support of that branch of his argument he relied principally on *Bryan v. Child* (a), *Brook v. Mitchell* (b), and *Billiter v. Young* (c).

The inclination of my opinion is that Mr. *Martin's* argument is well-founded, and supported by authority, to the extent that the intention of the Legislature was not to render the transaction void as against the debtor himself, but only to protect the rights and interests of the general creditors who might be prejudicially affected by secret and fraudulent warrants of attorney given to favoured creditors. For reasons which will appear hereafter, it is not necessary for me to state the grounds which in this respect influence my judgment: it is enough for me to say that, having regard to the general objects of the statute, and its various provisions affecting the property of bankrupts and insolvents, and especially those which relate to protected transactions and warrants of attorney, the inference to be deduced is, that the object and intention of the Legislature in the 334th section was to protect the rights and interests of creditors, but not to render the transaction void in its inception as between the debtor and the favoured creditors.

It seems to follow that the first four counts of the plaint are not maintainable. It is not necessary for me to offer any opinion whether under the 334th section the general creditors have any rights or protection save where the debtor becomes bankrupt or insolvent. The main question in the cause, which I have already

(a) 5 Exch. 368.

(b) 6 Bing., N. C. 349.

(c) 6 El. & Bl. 1; S. C., 1 H. of L. Cas. 682.

attempted to define, arises on the fifth count, for money had and received. H. V. 1864.

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The argument on this question turned on the language of sections 334, 335, and 336. These sections are no doubt open to just criticism, and it is difficult to reconcile their several provisions. Probably the defects in the frame of these sections arose from incorporating without sufficient care the provisions of other statutes, or from ill-considered amendments adopted too readily in the course of legislation. It is also true that, whatever construction may be put upon these sections, collectively or separately, anomalies and difficulties arise; and in yielding to the plaintiffs' argument, hardships and injustice may be occasioned, which my Brother HAYES will probably point out with his usual force. In the view which I take, it is not necessary to allude further to them. Upon the whole, however, I find it impossible to get over the clear, forcible, and comprehensive language of section 334. The Legislature has in that section expressed its intention, and seems to have intended what it expressed—viz., to render null and void as against the general creditors every warrant of attorney to confess judgment in a personal action, not duly filed in accordance with the provisions of the 3 & 4 Vic., c. 105, s. 12; and that, as a consequence, any judgment entered on such a warrant should also be void and inoperative.

Mr. *Meldon*, for the plaintiff, relied principally on three cases,—first, *Dillon v. Edwards* (a), in which it was decided that the warrant was not to be considered *filed*, within the meaning of the statute, unless the accompanying affidavit specifies “the time of its execution.” That case has since been repeatedly recognised and acted upon.

Secondly; he relied on *Acraman v. Herniman* (b), which arose on the construction of the 12 & 13 Vic., c. 106, s. 136, from which the 334th section of our statute was in substance taken. The facts in that case were similar to those in the present case, so as to raise the same question; but that in *Acraman v. Herniman* the judgment had not been registered, as in the case before us; there

(a) 2 M. & P. 550.

(b) 16 Q. B. 998.

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being no provision for registration in England similar to the 7 & 8 Vic., c. 90. Lord Campbell in his judgment says:—"The enactment is very plain; and I cannot agree to put a forced construction on it Here are a judgment and execution on a warrant of attorney given by a trader, and the warrant filed, but without an affidavit. The plain meaning of the statute is, that such a warrant of attorney shall be null and void against the assignees." The other Judges concurred; and judgment was given for the assignees. It was, however, argued very strenuously for the defendant that *Acraman v. Herniman*, even if well decided, is no authority in the present case, by reason of the registration of the defendant's judgment, and of the provisions of section 336 of our statute; and this seems to be the real point of the case.—[The learned Judge stated section 336.]—That section certainly creates considerable difficulty. It would seem to embrace all judgments whatever, except judgments on warrants of attorney, pleas of confession, or consents for judgment, duly filed pursuant to the 3 & 4 Vic., c. 105; and makes all, save the excepted judgments, fraudulent and void against the assignees in bankruptcy, if not registered within twenty-one days after entry. If it were not for the exception in section 336, a warrant of attorney should be not alone duly filed, but the judgment obtained upon it should also be registered, in order to give validity to the transaction as against assignees in bankruptcy; but, as the filing of the warrant with a proper affidavit afforded all the publicity and information that was required, such judgments are excepted out of section 336. It was urged, however, that all other judgments if duly registered within twenty-one days after entry come within the protection of section 336. But that section must be read in connection with, and subject to, the provisions of sections 330 and 334. Section 336 does not give any protection to a judgment which is otherwise invalid; nor does it in any manner relieve from the obligation to file the warrant under section 334.—[His Lordship here read section 330].

The third case on which Mr. *Meldon* relied was *Orr v. Devin* (a) which arose on the 333rd section of the Act, and in

(a) 9 Ir. Com. Law Rep. 100.

which the Court of Common Pleas decided that a judgment, entered on a warrant of attorney, void within that section, was as void as the warrant itself. The 330th section is tantamount to a declaration that a judgment entered on a void warrant can itself have no validity.

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It seems to me that the three cases principally relied on by Mr. *Meldon* in his succinct argument have been all well decided; that they are severally applicable to the case before us; and that *Acraman v. Herniman* is an authority in plaintiffs' favour, and directly in point. I am therefore of opinion that under section 334 the warrant of attorney in question, and the judgment entered on it, are null and void to all intents and purposes as against the plaintiff's assignees in bankruptcy; and that, being so null and void, the registration of the judgment does not set it up, or give it any life or validity; nor can it derive any protection from section 336. That section is not in fact a protecting clause.

It was urged, however, that the plaintiffs could not recover on the fifth count, and should resort to some form of special action founded on the statute. It seems to me that the defendant's contention is not in this respect well founded. If the assignees are entitled to treat the warrant and judgment as fraudulent, null and void as against their title, they may treat the money levied under the judgment as still belonging to the estate; and, in my opinion, may recover it in an action for money had and received to their use as assignees. In *Young v. Billiter* (b) Mr. Justice Blackburn expresses an opinion to that effect. The plaintiffs are therefore, in my opinion, entitled to judgment on the fifth count: judgment on the rest of the plaint to be for the defendant.

I ought to notice a special objection made by Mr. *Martin* to the replication, viz., that the plaintiffs do not therein, or at all, state that Skelly the bankrupt was a trader liable to the bankrupt laws at the time he executed the warrant, or when the judgment was obtained, or the *fieri facias* executed. The objec-

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tion is formidable, and has been pointed out in the demurrer; but I do not think it necessary to consider it further, as I assume that in fact Skelly was all the time a trader; and the plaintiffs should have liberty to amend, if they so desire, on such terms as the Court may think just and proper.

HAYES, J.

I am of opinion that the plaintiffs have no right to recover in this action; and accordingly that the demurrer taken to the plaintiff's replication ought to be allowed.

The case is said to turn upon the true construction of the 334th section of the Bankrupt Act (20 & 21 *Vic.*, c. 60). That and the accompanying sections (333-336) are plainly *in pari materia* with the 3 & 4 *Vic.*, c. 105, ss. 12, 13, and 14; and therefore ought to be construed as if those sections all formed parts of the same statute.

The 3 & 4 *Vic.*, c. 105, s. 12, reciting that injustice had been frequently done to creditors by secret warrants of attorney to confess judgment for securing the payment of money—thus treating the warrant of attorney as a security for money—enacts in substance that, if the holder of a warrant of attorney shall think fit, he may, within twenty-one days after its date and its defeasance (section 14), cause it, or a copy thereof, to be filed, together with an affidavit of the time of execution, in one of the Superior Courts, in which judgment shall be thereafter entered up; thus plainly contemplating that the notice that shall be thus given of the warrant is, while it is operating as a security for money, and, before it shall be used, an authority for an entry of judgment.

Then comes the 13th section, which enacts that if, after twenty-one days from the execution of a warrant of attorney, the party giving it shall become bankrupt or insolvent, the warrant, and any judgment that may have been entered thereon, shall be fraudulent and void as against the assignees, unless the warrant shall have been duly filed within the twenty-one days, or judgment signed within the same period. Hence we may learn that

the purposes of this statute would be served, and undue secrecy prevented, *either* by filing the warrant and affidavit within the time, *or* by entry of judgment within the time: and that, if neither of these be done, advantage may be taken of the omission whenever afterwards the bankruptcy or insolvency shall take place. The mode of notice is the same in both cases, viz., placing the document on the files of the Court, accessible to all who desire to refer to it; and the extent of the notice in either case is sufficient for the statutory purpose.

Let us now turn to the Bankrupt Act. The 333rd section prostrates and annuls every warrant of attorney or cognovit given by a person in insolvent circumstances, and within two calendar months of his bankruptcy or insolvency. The section says nothing of the judgment that may have been entered thereon; it merely speaks of a judgment or action when describing the character of the warrant; but it speaks of the warrant as to which it is legislating as one given for an antecedent debt. When it comes to deal with the cognovit or consent for judgment, which it does by a distinct clause of the sentence, then, as these are to be given in the course and progress of an action, either really existing or supposed to be existing, the statute necessarily speaks of the action, and limits the legislation, not to cases where the action has been brought *bona fide* for a portion of a right adversely resisted, but to the case where an action has been commenced by collusion, and for the mere purpose of giving a cognovit or consent in the progress of it. I am therefore of opinion that the statute in the 333rd section merely contemplates the warrant, cognovit, or consent for judgment, in the character of a security for money lent.

Then comes the 334th section, which enacts that any warrant of attorney or cognovit given by a bankrupt or insolvent, and *not* filed within twenty-one days, as prescribed by the 3 & 4 *Vic.*, "shall be deemed fraudulent, null and void, to all intents and purposes whatsoever." The remainder of the section is merely a re-enactment, as to warrants of attorney and cognovits, of that which had been enacted as to warrants of attorney alone by the

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joint enactment, as I may call it, I am led to think that in this, as well as in the 333rd section, the warrant and cognovit are contemplated and dealt with rather as securities for money lent than as steps to, and means of obtaining a judgment, as to which they are wholly silent.

The 335th section does not seem to be very skilfully framed. It would perhaps have been better if the earlier part of it as to the extending to cognovits and pleas of confession, the enactments of the 3 & 4 *Vic.*, as to filing, numbering, and searching for warrants of attorney, had formed a distinct section. But I will pass that by, merely observing that the creation of machinery for filing, searching, &c., is another argument that the Legislature here looked to these instruments rather as securities for money than steps to judgment. Then the section in its subsequent part deals with the cognovit, &c., not only in its prior character of a security for money, but also as subsequently operating by way of authority for, and as a step to judgment. And it enacts that if, after the expiration of twenty-one days from the execution of any plea of confession, cognovit, or consent for judgment, the party shall become bankrupt or insolvent, that plea, cognovit, or consent shall be deemed fraudulent and void against the assignees, unless it shall have been filed within twenty-one days, or within that time judgment shall have been entered and registered, pursuant to the 7 & 8 *Vic.*, c. 90. This last provision is similar to that which was made by the 3 & 4 *Vic.*, c. 105, s. 13, as to warrants of attorney, and the judgments thereon, save as to the registering under the 7 & 8 *Vic.*—an Act which was not then in force.

It is deserving of notice that, both in the 18th section of Pigot's Act and the 335th section of the Bankrupt Act, the Legislature provides expressly for the annulling of the judgment as well as of the primary security; and therefore would appear either not to have considered that the annulling of the judgment would have followed, as a legal consequence, from the annulling of the security; or to have dealt with the warrant, cognovit, &c., only as securities for money outstanding and in force so

long as no judgment was entered upon them; and to have thought that, as soon as that was done, the matter having passed *in rem judicatum*, the warrant, cognovit, &c., ceased to operate as a security, and became a mere authority executed. And this view seems to be more fully borne out by a consideration of the 336th section, which enacts that if, at any time after twenty-one days from the entry of any judgment, the party shall become bankrupt or insolvent, then such judgment shall be deemed fraudulent and void against the assignees, unless the judgment shall have been registered within such twenty-one days, or unless it shall have been obtained by virtue of a warrant of attorney, cognovit, &c., *duly filed* under the 3 & 4 Vic.—*i. e.*, within twenty-one days of its execution; thus implying that undue secrecy would be obviated, and the validity of the judgment insured by either of the two ways referred to, viz., either by registry of the judgment, or by filing the warrant, cognovit, &c., within twenty-one days; and that if the judgment should be obtained on a warrant, &c., not duly filed within twenty-one days (as is the present case) then registry of the judgment within that period would be requisite and sufficient for all the purposes of the statute. Acting then upon this clear implication in the 336th section, and being of opinion also that the 334th section, read in its actual collocation, meant to deal with and provide for the warrant of attorney and cognovit, and while in their condition of a security for money, and not after they had ceased to be so by the entry of the judgment, I am led to the inference that the judgment and execution of the defendant are good and valid, by reason of the registry of the judgment within the twenty-one days.

In conclusion, I would say a word or two as to some of the cases cited. *Orr v. Devin* (a) has been strongly relied on for the plaintiff; but that case differs from the present. From the moment of the giving of the warrant of attorney, it was subject to impeachment and infirmity, having been given by a person in embarrassed circumstances, and with bankruptcy impending. It continued under that impeachment and infirmity until and at the

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time that judgment was entered upon it; and that infirmity affected the warrant in both its aspects, not only as a security for money, but as a step to a judgment. A similar observation may be made as to *Hirts v. Hannah* (a) and *Kirks v. Edwards* (b). But, in the case now before us for judgment, the warrant was wholly unimpeached and unimpeachable when judgment was entered again. The case of *Acraman v. Herniman* (c) was decided upon the construction of two sections of English Acts (3 G. 4, c. 39, s. 1, and 12 & 13 Vic., c. 106, s. 136), analogous to the 3 & 4 Vic., c. 105, s. 12, and 20 & 21 Vic., c. 60, s. 334; but I do not find that any clause of any English Act, analogous to section 336 of our Act, was brought under the notice of the Court.

On the whole, I am of opinion that the demurrer ought to be allowed.

O'BRIEN, J.

This case involves some questions as to which, during part of the argument, I entertained considerable doubt; but, upon further consideration, I am of opinion, with my Brother HAYES, that our judgment should be in defendant's favour, and that the action cannot be sustained on any of the counts in the summons and plaint.

With respect to the first four counts (those in trover and detinue) we all concur in that result. Plaintiffs' Counsel rely on the 334th section of the Irish Bankrupt and Insolvent Act 1857 as rendering the warrant of attorney in question null and void, inasmuch as it was not filed, with an affidavit, within twenty-one days after its execution, as required by the 3 & 4 Vic., c. 105 (called Pigot's Act). Now, if the warrant be on that ground null and void, under the said 334th section, I think it follows, from the case of *Orr v. Devin* (d) and other cases cited by plaintiffs' Counsel, that the judgment and execution founded on the warrant would be equally so. I am, however, of opinion (in which indeed my Brother

(a) 17 Q. B. 383.

(b) 7 Jur. 199; S. C., 2 Dowl., note, 156.

(c) 16 Q. B. 998.

(d) 9 Ir. Com. Law Rep. 100.

FITZGERALD appears to concur) that, even supposing the warrant to be invalidated by that section, it and the judgment and execution would be null and void *only as against the assignees*, for the benefit of Skelly's creditors, in the event of his bankruptcy or insolvency; but that, as between Skelly and the defendant, the validity either of the warrant, judgment, or execution would not be affected by the warrant and affidavit not having been filed in due time. The 334th section is not confined to warrants, &c., given by *traders* (as is the corresponding provision in the 136th section of the English Bankrupt Act of 1849), but provides for warrants, &c., given "by any bankrupt or insolvent;" which would include warrants, &c., given by any party who, though at the time in good circumstances and not in trade, might at any time afterwards become bankrupt or insolvent. The fact that this section only affects the warrant in the event of such bankruptcy or insolvency shows that the enactment was intended merely for the benefit of the creditors of such party; and by the two subsequent sections (335 and 336) the judgments thereby declared to be null and void are only made so as against the assignees. There appears no reason why the judgments affected by the 334th section should be avoided by the non-filing of the warrant, to a greater extent than the judgments mentioned in those two subsequent sections. And, although the former section omits those qualifying words, "as against the assignees," which are contained in the two latter sections, I think that, having regard to the provisions of those subsequent sections, and to the policy and objects of the statute, we should hold that whatever effect the 334th section may have upon the warrant and judgment as regards the assignees, it does not render them null and void as against the debtor himself. Our putting such a limited construction on this section is in accordance with the principle laid down by Lord Tenterden in the case of *Morris v. Mellin (a)*, cited during the argument, where he states that "an enactment, the effect of which is to cut down, restrain, or abridge a written instrument, should have a limited construction." If, then, the warrant, judgment, and execution in question were not rendered void by the 334th

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(a) 6 B. & C. 449.

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section against Skelly himself, I think it clearly follows, from the case of *Young v. Billiter* (a), that, even supposing them to be rendered void by that section as against the assignees, still that the assignees would not be entitled to maintain trover or detinue for the goods which were seized. It appears upon the facts as stated in the present pleadings, that the goods in question had been seized and sold, and the proceeds paid over to defendant before the filing of the petition in bankruptcy, and without notice of any act of bankruptcy. And further, that the warrant was given, and judgment entered thereon, more than ten months before the filing of such petition. And it is not alleged that at the time of such warrant or judgment there was any contemplation of bankruptcy or insolvency, or that there was any voluntary or fraudulent preference or fraud whatever in the transaction, or even that any act of bankruptcy had been committed before the seizure or sale, or payment to defendant. The only ground relied on by plaintiffs is the omission to file the warrant and affidavit. And, even supposing that the warrant, judgment, and execution were thereby rendered void under the 334th section against the assignees, yet, as the seizure and sale were made before the filing of the petition, and without notice of any act of bankruptcy, I am of opinion that the assignees did not (by reason of such omissions to file the warrant and affidavit) acquire, by relation or otherwise, any possession, or right of possession, in the goods, so as to entitle them to maintain trover or detinue for such goods as their property. And further, that they cannot treat the seizure or sale as having been wrongful acts against Skelly, or even as against themselves at the time such seizure and sale were made. In *Billiter v. Young* (b) the question arose as to the right of an insolvent's assignees to bring trover for goods which had been seized and sold a few days before the insolvency petition, under an execution grounded on a warrant of attorney rendered void against the assignees by the 1 & 2 Vic., c. 110, s. 59 (as having been voluntarily given by the debtor when insolvent); and that question was discussed at much length in Lord Wensleydale's judgment in *Billiter v. Young*, as

(a) 8 H. of Lds. Cas. 682.

(b) 6 El. & Bl. 1.

delivered by Mr. Justice Crowder on the argument before the Court of Exchequer Chamber (a). That judgment, which was substantially adopted by the House of Lords on the appeal before them (b), fully states the reasons why, in Lord Wensleydale's opinion, trover could not be maintained by the assignees. And it appears to me to follow clearly from the principles he lays down, that trover or detinue could not be maintained in the present case, even supposing the warrant and judgment void against the assignees. It is true that in *Young v. Billiter* the statute upon which the question arose only made the warrant void "as against the assignees," whereas, by the 334th section of the Act before us, it is declared to be null and void "to all intents and purposes whatsoever." But if that 334th section should (upon the grounds I have already stated) receive the limited construction of rendering the warrant null and void only as against the assignees, then the principles laid down by Lord Wensleydale in his judgment would establish that trover or detinue could not be maintained in the present case. I shall have occasion to refer hereafter to a previous case of *Acraman v. Herniman* (c), in which the assignees of a bankrupt recovered in detinue for goods seized before the bankruptcy under an execution void against them under said 136th section of said English Bankrupt Act, but in which case the objection now relied on as to the right of the assignees to bring that form of action, even supposing the judgment, &c., void against them, was not argued or referred to.

The next question I shall consider is one of greater difficulty, and applies to all the counts of the summons and plaint—namely, whether, under the Irish Bankrupt Act of 1857, the warrant, judgment, and execution in this case are void, even as against the assignees. If that question rested on the 334th section alone, we could not, I think, avoid coming to any other conclusion than that contended for by plaintiffs, notwithstanding the serious consequences which defendant's Counsel have argued would result from our decision. Having regard, however, to other provisions of the

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(a) 6 El. & Bl. 3 to 13.

(b) 8 H. of L. Cas. 707.

(c) 16 Q. B. 998.

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statute (particularly to sections 335 and 336), and to its general policy and objects, I am of opinion that as, within twenty-one days from the signing of the warrant, judgment was entered thereon, and duly registered under the Irish Act passed in 1844 for the registry of judgments (7 & 8 Vic., c. 90), neither the judgment nor warrant was rendered void by the fact of the warrant not having been filed within that period, as required by the 334th section. It has been contended that such a construction of the statute would be contrary to the express provisions of that section; but in interpreting Acts of Parliament we are not bound to give full effect to a particular section according to its express terms, contrary to what would appear upon the whole of the statute to have been the intention of the Legislature in passing it. And I think that a consideration of other provisions in the statute before us will show that the Legislature did not intend the result contended for by plaintiffs' Counsel. The 334th section refers to Pigot's Act, which provides, in the 12th section, for the filing of every warrant of attorney (with an affidavit of the time of its execution) within twenty-one days from that time, in the Court in which judgment should thereafter be entered on such warrant; and it declares by the 13th section that unless such warrant and affidavit be filed within that time, *or judgment entered, or execution issued thereon, within same period*, then that such warrant, judgment and execution should be null and void against the assignees in bankruptcy or insolvency of the party signing such warrant. A subsequent section (15) provides for particulars of all warrants so filed being entered by the proper officer, and for searches to ascertain same. These sections of Pigot's Act correspond nearly with the first, second, and fifth sections of the previous English Act (3 G. 4, c. 39), except that the English Act required *all* warrants to be filed in the Court of Queen's Bench, though the judgments should afterwards be entered in another Court; and except also that the English Act applied only in cases of bankruptcy: it was however subsequently extended to cases of insolvency by an English statute passed before Pigot's Act. The manifest object of the Legislature in these several provisions was to prevent the frauds which a party might

commit, to the prejudice of his general creditors, by executing secret warrants of attorney, of which probably they would not be aware till the amount was levied out of their debtor's goods. This object was to a certain extent attained, by requiring that the warrant should be filed, or judgment entered thereon, within the twenty-one days, so that any creditor, by searches in the several Courts, could get notice of their existence. These provisions were however carried much further by the 136th section of the English Bankrupt Act of 1849 (11 & 12 Vic., c. 106), upon which the case of *Acraman v. Herniman* was decided, and which enacted that every warrant of attorney executed by any *trader*, and not so filed in the Queen's Bench within the twenty-one days, should be "null and void to all intents and purposes whatever." This section omits the reservations contained in the previous Act in favour of warrants upon which judgment was entered within the twenty-one days; so that the warrant, and the judgment obtained upon it, would be null and void if the warrant was not duly filed within that period, even though the judgment was entered within the same period. This was the ground of the decision in *Acraman v. Herniman*; and it was suggested, by Counsel during the argument of that case, that such reservation in the former Act was advisedly omitted by the Legislature, in order that creditors, instead of searching the several Courts for judgments, might acquire the requisite notice by a search in the Court of Queen's Bench alone for warrants duly filed. With regard to the Irish statutes the case is different. Under Pigot's Act the warrant was to be filed in the same Court in which judgment was afterwards entered; so that searches should be made in each of the Courts, in order to ascertain either what warrants were duly filed, or what judgments were duly entered, within the required period. Subsequently however, by the Irish Act of 1844, to which I have already referred, provision was made for registering *all* judgments (in whatever Court they were obtained) in one office, that of the Registrar of Judgments; so that a search in that office alone would ascertain what judgments were registered under that Act, together with the dates of registry and other particulars. The 335th and

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336th sections of the Irish Bankrupt Act of 1857 refer to that Act of 1844, and contain express reservations in favour of judgments registered under it within the specified time ; and from those provisions it would appear that the previous 334th section (which, with the exceptions I have mentioned, corresponded substantially with the 136th section of the English Bankrupt Act) was introduced into the Irish Act of 1857, because an enactment nearly similar was contained in the English Act, but was introduced without sufficiently considering the effect of the difference between the provisions of the previous statutes which applied to England and of those applying to Ireland, or considering how far that section would clash or be in conformity with the 335th and 336th sections of the Irish Act, which sections do not occur in the English Act. The former Irish Bankrupt Act of 1849 (12 & 13 *Vic.*, c. 107) does not contain any section similar to that 334th section, or to the 136th section of the English Act of 1849 (which was passed on the same day) ; but it contains two sections (111 and 113) which are substantially the same as the 335th and 336th sections of the present Irish Act. It will be clear, upon reference to those several sections, that under the Irish Bankrupt Act of 1849 the warrant and judgment in the present case would have been perfectly valid against the assignees ; and that the difficulty of the question we have to decide arises from the introduction, for the first time, into the Irish Bankrupt Law, of the enactment contained in said 334th section. The 335th section (after extending to pleas of confession, *cognovits actionem*, acknowledgments, and covenants for judgment, the provisions of Pigot's Act for the filing of warrants of attorney) then provides that all such pleas of confession, &c., and all judgments and executions thereon, shall be null and void against the assignees in bankruptcy or insolvency, except such pleas of confession, &c., be filed within twenty-one days from the making or signing thereof, *or unless within the same period judgment should have been entered thereon, and duly registered under said Irish Act of 1844* ; and it further entitles the assignees to recover all moneys levied or effects seized under such void execution.

It will be observed that "*cognovits actionem*" are included both

in this and in the 334th section, and that the 334th section declares them to be null and void unless duly filed, under Pigot's Act, within the twenty-one days, although that Act contained no provision for the filing of *cognovits*, and was only extended to them by said 335th section, according to which, however, it would not be requisite to file any *cognovit*, if the judgment thereon, was entered and duly registered within the same period. It is true that *cognovits actionem* were also included in the 136th section of the English Bankrupt Act of 1849; but that was in accordance with the third section of said English Act of 3 G. 4, c. 39, which provided for the filing of *cognovits* (a provision not contained in Pigot's Act); and there is no other provision in the English Bankrupt Act inconsistent with that 136th section. This inconsistency (as regards *cognovits*) between the provisions of the 334th section of the Irish Act and those of the 335th section, and of Pigot's Act, would further show that the insertion of that 134th section in the Irish Act may be accounted for in the manner I have already suggested; and that full effect cannot be given to all the provisions of the 334th section according to its terms. But the discrepancy, so far as it practically affects *cognovits*, is of little importance, inasmuch as *cognovits* signed by the party, in the form adopted in England, are seldom used in Ireland, where pleas of confession are adopted instead. We may therefore, for the present, consider the 334th section as dealing with one class of judgments, namely, those obtained upon warrants of attorney; and the 335th section as dealing with another class, namely, those obtained upon pleas of confession and consents for judgment. According to plaintiffs' argument, the result of the two sections (without reference even to the 336th) would be that, under the 334th section, warrants of attorney not duly filed, and the judgments thereon, would be null and void against the assignees, even though such judgments were entered and duly registered within the twenty-one days; whereas, under the 335th section, pleas of confession and consents for judgment (though not duly filed) would, together with the judgments obtained thereon, be valid against the assignees, if such judgments were duly entered and registered within that period. This would be a singular state of the law, as it would be difficult to

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336th sections of the Irish Bankrupt Act of 1857 refer to that Act of 1844, and contain express reservations in favour of judgments registered under it within the specified time; and from those provisions it would appear that the previous 334th section (which, with the exceptions I have mentioned, corresponded substantially with the 136th section of the English Bankrupt Act) was introduced into the Irish Act of 1857, because an enactment nearly similar was contained in the English Act, but was introduced without sufficiently considering the effect of the difference between the provisions of the previous statutes which applied to England and of those applying to Ireland, or considering how far that section would clash or be in conformity with the 335th and 336th sections of the Irish Act, which sections do not occur in the English Act. The former Irish Bankrupt Act of 1849 (12 & 13 Vic., c. 107) does not contain any section similar to that 334th section, or to the 136th section of the English Act of 1849 (which was passed on the same day); but it contains two sections (111 and 113) which are substantially the same as the 335th and 336th sections of the present Irish Act. It will be clear, upon reference to those several sections, that under the Irish Bankrupt Act of 1849 the warrant and judgment in the present case would have been perfectly valid against the assignees; and that the difficulty of the question we have to decide arises from the introduction, for the first time, into the Irish Bankrupt Law, of the enactment contained in said 334th section. The 335th section (after extending to pleas of confession, *cognovits actionem*, acknowledgments, and covenants for judgment, the provisions of Pigot's Act for the filing of warrants of attorney) then provides that all such pleas of confession, &c., and all judgments and executions thereon, shall be null and void against the assignees in bankruptcy or insolvency, except such pleas of confession, &c., be filed within twenty-one days from the making or signing thereof, *or unless within the same period judgment should have been entered thereon, and duly registered under said Irish Act of 1844*; and it further entitles the assignees to recover all moneys levied or effects seized under such void execution.

It will be observed that "*cognovits actionem*" are included both

in this and in the 334th section, and that the 334th section declares them to be null and void unless duly filed, under Pigot's Act, within the twenty-one days, although that Act contained no provision for the filing of cognovits, and was only extended to them by said 335th section, according to which, however, it would not be requisite to file any cognovit, if the judgment thereon, was entered and duly registered within the same period. It is true that *cognovits actionem* were also included in the 136th section of the English Bankrupt Act of 1849; but that was in accordance with the third section of said English Act of 3 G. 4, c. 39, which provided for the filing of cognovits (a provision not contained in Pigot's Act); and there is no other provision in the English Bankrupt Act inconsistent with that 136th section. This inconsistency (as regards cognovits) between the provisions of the 334th section of the Irish Act and those of the 335th section, and of Pigot's Act, would further show that the insertion of that 134th section in the Irish Act may be accounted for in the manner I have already suggested; and that full effect cannot be given to all the provisions of the 334th section according to its terms. But the discrepancy, so far as it practically affects cognovits, is of little importance, inasmuch as cognovits signed by the party, in the form adopted in England, are seldom used in Ireland, where pleas of confession are adopted instead. We may therefore, for the present, consider the 334th section as dealing with one class of judgments, namely, those obtained upon warrants of attorney; and the 335th section as dealing with another class, namely, those obtained upon pleas of confession and consents for judgment. According to plaintiffs' argument, the result of the two sections (without reference even to the 336th) would be that, under the 334th section, warrants of attorney not duly filed, and the judgments thereon, would be null and void against the assignees, even though such judgments were entered and duly registered within the twenty-one days; whereas, under the 335th section, pleas of confession and consents for judgment (though not duly filed) would, together with the judgments obtained thereon, be valid against the assignees, if such judgments were duly entered and registered within that period. This would be a singular state of the law, as it would be difficult to

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assign any reason why, as regards the rights and security of creditors, the legislation should not be uniform with respect to both classes of judgments, or why, on similar states of facts (namely, the warrants, pleas of confession, and consents, not being duly filed, but judgments being entered thereon, and duly registered within the required time), one class of judgments should be vitiated by the Act, and the other class unaffected by it. Independently however of this consideration, which I admit would not of itself be sufficient ground for deciding against the express terms of the 334th section, I think that the provisions of the 336th section show that the Legislature did not intend that a judgment such as that now before us, entered and registered within due time, should be rendered null and void if the warrant upon which it was obtained had not been duly filed. The 336th section provides that *all* judgments (except those obtained upon warrants of attorney, pleas of confession, &c., duly filed, as aforesaid), should be null and void against the assignees in bankruptcy or insolvency, unless such judgments were duly registered under the Irish Act of 1844 *within twenty-one days from the entry or signing of the judgment*. This section, as I have already mentioned, corresponds substantially with the 113th section of the previous Irish Bankrupt Act of 1849, and would (as well as that 113th section) apply to a judgment such as the present, which (having been obtained upon a warrant *not* duly filed) is not therefore one of the judgments excepted from the operation of the section. It is true that neither the 136th section of the present Act, nor the 113th of the previous Act, requires in terms that judgments obtained upon warrants, pleas of confession, or consents, not duly filed, should be entered within any particular time after the signing of the warrant, plea, or consent. Such a provision (which would certainly be requisite for the due protection of the general creditor) was however made as regards judgments obtained upon warrants not duly filed by the 13th section of Pigot's Act, which required such judgments to be entered within twenty-one days from the making of the warrant, and it was made as regards judgments obtained upon pleas of confession or consents not duly filed, by the 335th section of the present Act, and the 111th of the previous Act, which required such

judgments to be entered and registered within twenty-one days from the signing of such plea or consent. With respect to the case now before us, although the warrant was not duly filed, neither it nor the judgment obtained on it would have been vitiated by Pigot's Act, inasmuch as the judgment was entered within twenty-one days from the execution of the warrant, as required by the 13th section of that Act. The 336th section of the present Act rendered it also requisite that such a judgment (having been obtained upon a warrant not duly filed) should be registered within twenty-one days from the entering of the judgment, in default whereof the judgment was declared to be null and void against the assignees. And I think the fair inference of the Legislature's intention from that provision would be, that such a judgment, entered within twenty-one days from the execution of the warrant, should not be rendered null and void by the fact of the warrant not having been duly filed, except in the event of such further requirement as to the registry of the judgment not being complied with. According to the argument of plaintiffs' Counsel, the judgment, though entered within the twenty-one days required by Pigot's Act, would be null and void under the 334th section, whether it was registered in due time or not; while the subsequent 336th section only declared it to be null and void in the event of its not being registered in due time.

Plaintiffs' Counsel have argued that the 334th section would be altogether inoperative, if the effect they contend for be not given to it; but in answer to this it may be urged that, if such effect be given to that section, then that the provisions of the 336th section, with respect to the registry of such judgments as that now before us, would be inoperative; and a compliance with it would be of no avail. If the exception in the 336th section had included *all* judgments obtained upon warrants, whether such warrants were duly filed or not, then the present judgment would be affected only by the 334th section, which renders the due filing of the warrant essential to the validity of the judgment, and which omits the reservation contained in Pigot's Act in favour of judgments entered within twenty-one days from the ex-

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ecution. The case of the present judgment would then be governed by the decision in *Acraman v. Herniman*; but that case is, in my opinion, essentially distinguishable from the present, by the fact already mentioned, that the reservation in the 336th section of the Irish Act includes judgments (such as that now before us), obtained upon warrants not duly filed; while in the English Act there is no similar provision, nor any other that could be relied on as controlling the positive enactment of the 136th section. It is also to be observed that the present judgment would have been perfectly valid against the assignees under the previous Irish Bankrupt Act of 1849. The provisions of the 113th section of that Act clearly showed the intention of the Legislature, that judgments obtained upon warrants not duly filed should nevertheless be valid against the assignees if entered and registered within the prescribed time. Those provisions were in substance re-enacted by the 336th section of the present statute; and there is nothing in that statute (except the 334th section) which indicates the intention of the Legislature that thenceforth the due entry and registry of such judgments should be altogether unavailing. It has not been argued that such an alteration in the law was required to carry out the policy of the Legislature in protecting creditors from secret warrants of attorney, or that such object would not be as effectually attained by substituting the due entry and registry of the judgment for the filing of the warrant. In *Acraman v. Herniman* (a), Erle, J., refers to the 113th section of the Irish Bankrupt Act of 1849 (which was then in force in this country), and to the provision thereby made, under the previous Irish Act of 1844, for the registration of judgments; and, according to his opinion, the existence of that special provision was a sufficient reason for the different legislation in the English and Irish Bankrupt Acts of 1849, as to the validity of judgments obtained upon warrants not duly filed. The question we are considering is not free from difficulty, as our decision, whether in plaintiffs' or defendant's favour, would be at variance with some one or other of the sections of the Irish Bankrupt Act of 1857; but in my opinion the

(a) 16 Q. B. 1004.

sounder construction, upon the whole of the statute, would be that, although the warrant of attorney upon which a judgment is obtained be not duly filed, yet that neither the warrant nor judgment is void under that statute if such judgment be entered and registered within due time. It is laid down as a general rule by Bayley, J., in the case of *Morris v. Mellin* (a) to which I have already referred, "that, in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the Legislature." I think that principle is applicable to the present case. The warrant and judgment in question would, under the circumstances now before us, have been perfectly valid before the passing of the Irish Bankrupt Act of 1857; and, considering the several provisions of that statute to which I have referred, it cannot be said that, upon the whole of the statute, there is no doubt of the intention of the Legislature that a warrant and judgment under those circumstances should thereafter be null and void.

Another ground of objection has been relied on by defendant's Counsel, which, however, only applies to the fifth count of the summons and plaint, and which, in my opinion, is well founded, namely, that, even supposing the warrant, judgment, and execution to be null and void against the assignees under the 334th section, still they are not entitled to bring an action for the amount levied under the execution as money received by defendants to the use of the assignees. With respect to judgments which are void under the 335th and 336th sections, the assignees are by those sections expressly entitled to recover for the benefit of the bankrupt's or insolvent's estate, and for the use of his creditors, all moneys levied under any executions on such judgments. But the present judgment is not void under either of those sections; and the 334th section, on which alone the plaintiffs can rely as avoiding the judgment, contains no provision for any action to be brought by the assignees. Even supposing that, in the present case, the judgment and execution under which the money was levied were void against the plaintiffs as assignees, still they were valid as against Skelly

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(a) 6 B. & C. 450.

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himself; and the money was levied before bankruptcy, or notice of any act of bankruptcy, and without any fraudulent preference, &c.; and although, according to the opinions expressed by some of the Judges and Law Lords, in *Billiter v. Young* and *Young v. Billiter* (a), the assignees would, under such circumstances, be entitled to maintain *some* form of action other than trover or detinue, I am of opinion that they would not be entitled to bring an action for money had and received to their use. In the case of *Pennell v. Aston* (b) Baron Parke, with respect to the right of the assignees in bankruptcy to maintain such an action, states as follows:—"The assignees could not sue for money as had and received to their use, unless it was received by the defendants after the bankruptcy, or unless it was received before the bankruptcy by way of fraudulent preference; for then it would not be paid to the use of the bankrupt." In my opinion, that rule applies to the present case, as to the fifth count.

On these several grounds, I think that, on the pleadings, the present action is not maintainable as to any of the counts; and that accordingly judgment should be given for the defendant.

(a) 6 Ell. & Bl. 15; S. C., 8 H. of L. Cas. 682.

(b) 14 M. & W. 417.

*Cyrcbequet Chamber.**

MURPHY and another, Assignees of JOHN SKELLY,
 Plaintiff in Error,

v.

JOHN KEEFE, Defendant in Error.

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 Nov. 18, 21.

THIS was an appeal from the decision of the Court of Queen's Bench.

* Before MONAHAN, C. J., PIGOT, C. B., CHRISTIAN, J., FITZGERALD, HUGHES, and DEASY, BB.

Kernan and *Meldon* appeared on behalf of the plaintiffs in error. The arguments were the same as those addressed to the Court below.

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Heron and *Martin*, on behalf of the defendant in error, cited *Banbury v. White* (a), to show that the securities might have been good for twenty-one days at all events; and that section 334 of the 20 & 21 *Vic.*, c. 60, deals with warrants of attorney, &c., only so long as they are *securities*, and does not touch them after they have become judgments. This was the only new authority cited.

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In this case the plaintiffs sue as assignees of John Skelly a bankrupt. In the first count they allege that the defendant converted to his own use certain goods of the plaintiffs, as such assignees. In the second they allege that he converted to his own use certain goods of the bankrupt before he became bankrupt. In the third they allege that, before Skelly became bankrupt, the defendant took and carried away goods of his. In the fourth they allege that the defendant detained goods of the plaintiffs, as such assignees. In the fifth they allege that the defendant is indebted to them as assignees for money had and received by him to their use. To this the defendant pleaded that, before Skelly became bankrupt, he (defendant) recovered a judgment against him for £1207, which was duly registered, in compliance with the provisions of the Irish Bankrupt and Insolvent Act 1857, within twenty-one days from its entry in the office of the Registrar of Judgments, and afterwards duly registered pursuant to the provisions of the 7 & 8 *Vic.*, c. 90; and that before Skelly became a bankrupt, and while he was in possession of the goods in question, defendant issued a writ of *fi. fa.* under the judgment, marked for £546. 12s. Od., and delivered it to the Sheriff of the city of Dublin; and that before Skelly became bankrupt, the Sheriff, by virtue of that writ, seized the goods in question; and before the filing of any petition in bankruptcy, he sold the goods so seized,

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and by such sale levied the sum of £383. 5s. 3d.; and that that sum was paid over to him the defendant prior to the filing of the petition in bankruptcy, and before he had notice of any act of bankruptcy committed by Skelly. To this the plaintiffs have replied that the judgment relied on was entered by virtue of a warrant of attorney, and that a copy of it was not lodged, within twenty-one days after its execution, with the proper officer of the Court in which it was recovered; and that a petition in bankruptcy was duly presented, under which Skelly was declared bankrupt, and the plaintiffs were duly appointed assignees; and the warrant, the judgment, and execution, thereby became null and void. To this replication the defendants demurred; and the Court of Queen's Bench allowed the demurrer.

The question for this Court is whether that decision is right; and I am of opinion that it is, for the following reasons:—The 344th section of the Irish Bankrupt and Insolvent Act 1857, which is that relied on by the plaintiffs, provides that if any warrant of attorney to confess judgment shall have been given by any bankrupt or insolvent, and such warrant or a true copy of it shall not have been filed with the proper officer of the Court in which judgment shall thereafter be entered, within twenty-one days next after the execution thereof, in manner prescribed by the Act 3 & 4 Vic., c. 103, every such warrant shall be deemed fraudulent, null and void to all intents and purposes whatsoever. Upon the very terms of this section it is plain that, in order to make it applicable to any particular case, there must be not only an omission to file the warrant within the prescribed time, but there must be also a bankruptcy or insolvency supervening: until the occurrence of one or other of those events the warrant and everything done in pursuance of it remains in full force and effect unaffected by it. In the present case the entering the judgment, the issuing execution, the levy and sale under it, and the payment over to the plaintiff took place before the bankruptcy, and before notice of any act of bankruptcy. They were all lawful and valid at the time they took place. The defendant had recovered, on foot of a valid judgment, by means of a regular and lawful execution, payment of a debt

admitted to be due; and unless the plaintiffs can succeed in the construction they seek to put on the section to which I have referred, he is entitled to retain it. The plaintiffs' construction of that section is, that not only is the warrant of attorney avoided by the bankruptcy, but that that avoidance has a retrospective operation, and affects with invalidity everything done by the authority of it; and such acts, perfectly legal when they were done, are rendered illegal by a subsequent event. That is a construction which I cannot give to the 344th section. The words of the section do not require or, I think, admit of it. They are fully satisfied by holding that, from the date of the bankruptcy or insolvency the warrant, and any judgment entered on it, shall be null and void, without invalidating or disturbing an execution issued and executed by actual levy of money previous to that date. "It is a general rule," said Lord Tenterden, in the case of *Morris v. Mellin* (a), "in the interpretation of Acts of Parliament, that an enactment, the effect of which is to cut down, restrain, or abridge a written instrument, shall have a limited construction." The Court, in that case, refused, on application by the assignee of an insolvent conuzor, to set aside a judgment entered against him by virtue of a warrant of attorney, upon the ground that the warrant was void under the 3 G. 4, c. 39, s. 4. The majority of the Court there held that, though that section enacts that every warrant of attorney not filed in compliance with its provisions should be void to all intents and purposes, those words must be construed as against the assignees of a bankrupt, and that it was perfectly valid as against the party who gave it. Holroyd, J., dissented from that construction, and said the words should receive their natural meaning. The same question was again brought before the Court in *Bennett v. Daniel* (b), and the majority of the Court came to the same conclusion; Parke, J., dissenting. But in the subsequent case of *Davis v. Eyton* (c), Tindal, C. J., treated the question as settled. Those cases are not precisely authorities upon the present question, because they were decided upon an Act differently framed; and the Court considered

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(a) 6 B. & C. 446.

(b) 10 B. & C. 500.

(c) 7 Bing. 154.

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that the other sections of that Act showed that the section relied on by the applicant was intended solely for the protection of assignees of bankrupts. The case of *Bryan v. Child* (a) was decided upon the construction of a section in the English Act, which corresponds with the 344th section of the Irish Bankrupt Act, and is a strong authority in favour of the defendant. The 137th section of the English Bankrupt Act, 12 & 13 *Vic.*, c. 106, provides that every Judge's order, made by consent of a trader, authorising the entering up a judgment against him, shall be filed, in manner therein prescribed, within twenty-one days; "otherwise such Judge's order, and "any judgment entered thereon, and any execution issued thereon, "shall be null and void to all intents and purposes whatsoever." In *Bryan v. Child* the plaintiff brought an action of trespass for breaking and entering his house and taking his goods. The defendant justified under a *fi. fa.* issued on foot of a judgment; the plaintiff replied that the judgment was entered upon a Judge's order, made by his consent, he being a trader; and that the provisions of the 137th section had not been complied with. But the Court held that those general words must be limited in construction to the case of a trader becoming bankrupt, and that until that event happened the judgment and execution were perfectly valid. In giving judgment in that case, Pollock, C. B., adopting suggestions thrown out by Alderson, B., who, in the course of the argument, referred to the word "fraudulent," which is used in the next preceding section (section 136), the one corresponding with that now under consideration, and said:—"The 136th section "declares that warrants of attorney, not filed as thereby required, "shall be deemed fraudulent as well as void;" but how can they be deemed fraudulent as against the trader himself? It must mean as against his creditors. Now that same word "fraudulent" occurs in the section under our consideration; and, according to the view of Alderson, B., which was adopted by Pollock, C. B., it shows that the Legislature meant to annul such warrants only against the creditors of the person who gave them, and not as against the debtor himself. The language of the 344th section is more in

(a) 5 *Exch.* 368.

accordance with that construction than that of the section which Alderson, B., referred to. That section annuls all judgments entered on warrants of attorney given by traders, when its provisions are not complied with. The section under our consideration only annuls such warrants as are executed by bankrupts or insolvents, when not filed in compliance with its directions; showing that the Legislature meant to annul them only on the happening of one or other of those events, and for the benefit of the persons who would become entitled to the property of the conusor upon such occurrences, namely, the creditors under the bankruptcy or insolvency. That makes the decision in *Bryan v. Child* a very strong authority in the present case. There it is that the question arose between the conusor and conuzee before bankruptcy; whereas here it arises between the assignees in bankruptcy. But the case of *Brook v. Mitchel* (a) shows that the commission of bankruptcy does not invalidate executions issued under judgments prior to the bankruptcy, although the judgments themselves were annulled by it. That was an action of trover, brought by the assignees of a bankrupt on the possession of the bankrupt. The goods were seized and sold under an execution on a judgment entered by reason of a warrant of attorney not filed within twenty-one days, as prescribed by the second section of 3 G. 4, c. 39. The Court held that, as the possession was laid in the bankrupt, and the commission before the bankruptcy, and as the warrant and judgment were made void only as against the assignees, and not as against the bankrupt himself, the judgment and execution were valid as against him, and the levy was no wrongful conversion. The report of that case in 8 *Sull.*, p. 739, shows that the pleadings were similar to those in the present case. The plaintiffs declared upon a possession of the goods by the bankrupt, and a conversion before the bankruptcy. The defendants pleaded a judgment recovered against the bankrupt, an execution and sale under it before the bankruptcy. The plaintiffs replied that the judgment had been entered by virtue of a warrant of attorney which had not been filed in manner prescribed by the 3 G. 4, c. 39. To this the defendant demurred; and the Court allowed the de-

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murrer. In giving judgment, Tindal, C. J., says:—"The statute " 3 G. 4, c. 39, does not make the warrant, the judgment, and execution void absolutely against all persons, but only as against the "assignees under the subsequent commission." As against the bankrupt himself therefore the judgment was good, and the execution a valid execution; and so the transaction would remain a good and valid execution against him, at all events up to the time of the bankruptcy. Upon no legal construction therefore, as it appears to us, can the allegation be supported that there was any wrongful conversion before the bankruptcy. But, in the action of trover itself, the allegation is not maintainable by the plaintiffs, because they never had the possession, nor the right to the possession of these goods in themselves as assignees. By no earlier statute is the relation carried back to a further point than to the act of bankruptcy; and there are no words in the statute in question which vest the property in the goods by relation in the assignees, either from the warrant of attorney, or the judgment or execution. There, in like manner, the plaintiffs never had the possession, or the right to the possession of the goods; for the possession, and the right to the possession, had been transferred to a third person by a sale valid when it took place as against the bankrupt; and there is no relation back to any prior act of bankruptcy to entitle the assignees to avoid the transfer.

If I be right in the construction I have put on the 334th section of the Irish Bankrupt Act, that it annuls the warrants of attorney thus dealt with only in the event of bankruptcy or insolvency, and for the benefit of creditors, that case is a precise authority that the counts in this summons and plaint which allege a possession in the bankrupt, and a conversion before the bankruptcy, cannot be sustained. That case is cited with approbation, and relied on in the judgment of Lord Wensleydale in the case of *Billiter v. Young* (a), which was confirmed by the House of Lords (b). That case of *Billiter v. Young* is itself a strong and decisive authority against the plaintiffs, at least as regards the counts in which they allege a conversion before the bankruptcy. That was an action of trover, brought by the assignees of an insolvent for a conversion of the

(a) 6 El. & Bl. 15.

(b) 8 H. of L. Cas. 682.

goods of the insolvent. The defendant relied on a judgment and execution against the insolvent, and a sale under the execution before the insolvency. The assignees relied on the 1 & 2 Vic., c. 110, s. 59, which provides that, if any person being in insolvent circumstances should voluntarily charge his property for any creditor, such charge should be fraudulent and void as against his assignees, if made within three months before the imprisonment. It was held by the House of Lords, reversing the judgment of the Exchequer Chamber, that the action could not be maintained. The ground on which the judgment of the House of Lords was based was, that the warrant was valid when the transaction took place; and that there was no relation back which would enable the assignees to avoid it. Now, that state of facts exists in the present case. The warrant, the judgment, and execution were all valid when the sale, which is the conversion complained of, took place; and there is no averment of a previous act of bankruptcy to which the title of the assignees could relate: they took only what was the property of the bankrupt at the time of the bankruptcy; and at that time the goods in question had ceased to be his property, because they had been sold under a valid execution. It is said that in the case of *Billiter v. Young* the warrant was made void as against the assignees; whereas here it is, by the section in question, made void, to all intents and purposes. But, according to the case of *Bryan v. Child*, there is really no distinction on that ground, because there it was held that similar words did not deprive the warrant of validity against the bankrupt or insolvent, and that he never could complain of an execution under it. But, besides, the controversy in *Billiter v. Young* was between the assignees, as to whom the warrant was expressly made void; yet it was held that such avoidance did not entitle them to interfere with or complain of an act done under it while it was subsisting and in force. So, in like manner, I am of opinion that the plaintiffs here cannot complain of a sale of goods under an execution which was perfectly valid when it took place, which the Sheriff was warranted and bound by law to make, and which validity transferred the goods sold to the purchaser.

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It remains to be considered whether the plaintiffs can recover the proceeds of the sale under the count for money had and received; and there are expressions in the judgments of some of the Judges who were consulted by the House of Lords in the case of *Billiter v. Young*, indicating an opinion that, under the circumstances of that case, the assignees, though they could not treat this sale as a wrongful act, might yet recover the proceeds of it in an action for money had and received. Blackburne, J., says (a):—"I am strongly disposed to think that as soon as the assignees avoid the transaction they may, by an action for money had and received, or at all events by a properly shaped action, make the favoured creditor refund any benefit which he wrongfully received." Crompton, J., says, p. 701:—"In cases where the goods were in the hands of the creditor there can be no difficulty in demanding them; bringing trover on a refusal: and if the creditor has sold the goods, money had and received might perhaps lie, though I am much struck with the remarks of Cresswell, J., as to whether money had and received is the proper form of action in such a case." Wightman, J., says [p. 704]:—"It may be that the assignees might be entitled to succeed in a special action on the case, or after a demand and refusal." But those expressions were used with a reference to a state of facts materially different from that before us. In that case the warrant was given by way of fraudulent preference, and there was evidence that the creditor was cognizant of the circumstances and was a participator in the fraud. That is stated in the opinion of Crompton, J. [p. 699]. Yet even in that state of facts, the Lords who gave judgment do not seem to have thought that the assignees could sustain an action for money had and received. Lord Campbell [p. 708] says:—"But I by no means say that the assignee is without a remedy; on the contrary, I am inclined to think that, by a declaration properly framed, he might recover for the benefit of the creditors, the warrant of attorney being made void as against the assignees." Lord Wensleydale does not seem to have agreed in that opinion. For

(a) 8 H. of Lds. Cas. 693.

he says [p. 708] :—" I beg to express a doubt, but only a doubt, "whether my noble and learned friend on the woolsack is right in saying that there could be any form of action in which the assignees could have redress, as no injury was done to them; and their remedy was to take the goods, supposing the warrant to be void." The other Law Lords expressed no opinion upon the point. But if the sale of the goods were valid at the time, and if the assignees cannot treat the sale as a conversion of the goods, treating them either as the property of the bankrupt or as their property, it follows, I think, that they cannot recover the proceeds of the sale, as money had and received to their use; when it was received by the creditor from the Sheriff, it was received as the proceeds of the sale of the debtor's goods, under an execution sued out upon a subsisting judgment. Unless that execution can be avoided by the subsequent bankruptcy, I do not see how the proceeds of the sale under it can become money had and received to the use of the assignees under it. That is, I think, clearly shown in the judgment of Cresswell, J. (a); and his reasoning is, to some extent, adopted by Crompton, J., in the passage which I have already cited from his opinion given to the House of Lords. Lord Wensleydale, in the judgment read by Crompton, J., in the Exchequer Chamber, shows that, even if the execution and sale under it were void, the assignees could sustain no action in respect of it; and he adopted that judgment when deciding the case in the House of Lords.

HUGHES, B., concurred in affirming the judgment of the Court below.

FITZGERALD, B.

The substantial subject of complaint in this action is a seizure and sale by the defendant, for his own benefit, of certain goods of the bankrupt. The sale was in fact made by the Sheriff of Dublin, under an execution issued by the defendant against the bankrupt; and the proceeds of the sale were paid by the Sheriff to the defendant. The seizure, the sale, and the payment over of the

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(a) 6 EL. & BL. 26, 27.

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proceeds, were all prior to the filing of the petition in bankruptcy; and the defendant had not at the times of seizure, sale, payment, or any of them, notice of any prior act of bankruptcy of the bankrupt.

The execution was issued on a judgment entered by the defendant against the bankrupt, under or by virtue of a warrant of attorney given by the bankrupt to the defendant. The judgment was so entered within twenty-one days after the execution of the warrant of attorney; but within that time there was not filed in the Court in which the judgment was entered, the warrant of attorney or a true copy thereof, *together with* an affidavit of the time of the execution of the warrant. The judgment, however, was within twenty-one days after its entry duly registered pursuant to the Act 7 & 8 Vic., c. 90.

In this state of things two questions arise:—First, whether the warrant of attorney, the judgment, and the execution founded on it are to be deemed wholly null and void; and, secondly, if so, whether the plaintiff can take advantage of such avoidance in any of the forms contained in the plaint.

As to the first question. By the 334th section of 20 & 21 Vic., c. 60, which Act commenced on the 1st of November 1857, long before the warrant of attorney in question was given, it is enacted, that, "If after the commencement of this Act, *any* warrant of attorney to confess judgment in any personal action, or any *cognovit actionem* in any personal action, *shall have been given by any bankrupt* or insolvent, and such warrant or cognovit, or a true copy thereof, shall not have been filed *with the proper officer in the Courts at Dublin, in which judgment or such warrant or cognovit shall thereafter be entered up*, within twenty-one days next after the execution thereof, in manner and form provided by the Act passed in the session of the third and fourth years of the reign of her Majesty, chapter 105, every such warrant and cognovit shall be deemed fraudulent, null, and void to all intents and purposes whatsoever."

The provision of the Act 3 & 4 Vic., c. 105, referred to here is contained in the 12th section of that Act, which enacts:—"That

"from and after the 1st day of November 1840, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and endorsements thereon (if any) shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the proper officer in one of her Majesty's Superior Courts of Dublin, in which judgment upon such warrant of attorney shall thereafter be entered up."

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It seems to me that the cases of *Dillon v. Edwards* (a) and *Acraman v. Herniman* (b), decisions on the English Act 3 G. 4, c. 39, corresponding in many respects with the 3 & 4 Vic., c. 105, must be considered as express authorities that the failure to file, together with the warrant, an affidavit of the time of its execution, within twenty-one days after such execution, is a failure to comply with the form and manner of filing the warrant provided by the 3 & 4 Vic., c. 105.

I shall have occasion presently to observe on some difference between the provisions of the English and Irish Acts; but it does not seem to me to affect the position for which, and for which only, I at present use the cases I have cited. That being so, it seems to me that the warrant of attorney on which judgment was entered in the present case must, by the express terms of the 334th section of 20 & 21 Vic., c. 60, be deemed fraudulent, null, and void to all intents and purposes whatsoever.

I am unable to conceive stronger terms in which the Legislature could, if so minded, absolutely define an instrument of any validity whatsoever without qualification. I can see no absurdity or repugnancy in giving to the words their obvious meaning; and I do not feel myself at liberty to read, with a qualification, what the Legislature has stated shall be without qualification. In the same statute I find sections immediately adjoining this, as the 335th and 336th, taking from *other* instruments and records—as pleas of confession, cognovits, acknowledgments, counts for judgment, judgments and executions,—validity *as against* assignees in bankruptcy

(a) 2 M. & P. 550.

(b) 16 Q. B. 498.

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and insolvency, and providing the assignees with remedies appropriate to such qualified avoidance: and this seems to me to show that the Legislature was fully aware of the distinction between a qualified and absolute avoidance. This conclusion is, in my mind, much confirmed by the fact that the 3 & 4 *Vic.*, c. 105, did contain a provision in the 13th section avoiding warrants of attorney not filed in manner and form provided by the 12th section, but only against assignees, and did give to the assignees the remedy appropriate to such qualified avoidance; and I can hardly conceive that a different mode of legislation was adopted in the two statutes without some object.

It seems to me that a necessary consequence of treating the warrant of attorney as null and void to all intents and purposes is the avoidance of the judgment and execution thereon founded. This was considered to be the necessary consequence in the two cases to which I have referred; and I confess it seems to me distinctly contemplated by the Legislature itself, in the 20 & 21 *Vic.*, c. 60; for while the 328th section of that Act gives validity to executions *bona fide* levied by seizure and sale before the filing of the petition in bankruptcy, provided a person at whose suit such execution shall have been issued had not notice of any prior act of bankruptcy, the 330th section provides that nothing in the Act contained shall be deemed to give validity to any warrant of attorney, &c., declared to be null and void; nor to give validity to any judgment entered up under or by virtue of such warrant, nor to any extent executed or levied under or by virtue of such warrant.

I can see no ground for limiting the operation of the 334th section to warrants of attorney, while they continue securities for money as such only, and before judgment entered. For the warrants avoided are warrants given *at any time* after the commencement of the act, by a person thereafter declared bankrupt. The invalidity, therefore, can only be ascertained by a subsequent bankruptcy; and, besides, the section seems to me to apply in terms to a warrant of attorney on which judgment shall be entered up. I am aware that authorities are to be found for giving to expressions in statutes, as strong, or nearly as strong as those before us, a

qualified effect; but this has only been done where, upon the whole context, it has appeared clear that such must have been the meaning of the Legislature, because otherwise there would be some clear repugnancy or absurdity in its provisions. Some of these decisions, I confess, have not appeared to me very satisfactory; but the Courts in making them have always considered themselves as able to discover some very cogent reason for taking from the words of the Legislature their obvious and natural meaning. Thus, in the case of *Morris v. Mellin* (a) and *Bennett v. Daniel* (b)—which I particularise only as being decisions on an Act of the same nature as that before us,—the Courts (though in each case with a dissentient voice) give to strong words of avoidance, in the fourth section of 3 G. 4, c. 39, a qualified effect. But the ground of these decisions appears to have been this—the second section of that Act avoided as against assignees only, warrants of attorney not filed within a certain time. There the fourth section provided that if *such* warrants of attorney were given subject to any defeasance or condition, such defeasance should be written on the same paper with the warrant, in the manner therein directed, before the time *when the warrant was filed*, otherwise the warrant should be void to all intents and purposes. On the word “such” the Court held that the warrants of attorney intended by the fourth section must be considered the same class of instruments as those mentioned in the second section; and that the Legislature could not have intended to give to a particular defect in a warrant of attorney filed a greater effect than to the absence on the file of the warrant of attorney altogether, but that the two sections referring to the same class of documents, the latter and more generally expressed section was to be interpreted by the former. In the case of *Bryan v. Child* (c) the question was rather as to the meaning of the word “trader” than of the words “null and void to all intents and purposes;” and the decision only was that the word “trader” was to be read as “trader becoming bankrupt.”

But another matter has been urged against the conclusion at which I have arrived, which appears to me to require more parti-

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(a) 6 B. & C. 446.

(b) 10 B. & C. 500.

(c) 5 Exch. 369.

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cular consideration: it is this, that the 334th section of the 20 & 21 *Vic.*, c. 60, does not at all apply to judgments entered upon warrants of attorney within twenty-one days after the execution of such warrants. They, it is said, are regulated by the 336th section of the Act, which provides that "If, at any time after twenty-one days "from the entering or signing of any judgment whatsoever, in any "of the said Superior Courts (save and except judgments entered "upon or by virtue of warrants of attorney, pleas of confession, or "consents for judgment duly filed under the provisions of this Act, "or of the hereinafter mentioned Act of the third and fourth years of "her present Majesty, chapter 105), a petition of bankruptcy shall "be filed against the person against whom such judgment shall be "entered or obtained, under which he shall be duly found or declared "a bankrupt . . . then and in such case, unless such judgment shall have been duly registered within twenty-one days "from the entry or signing thereof in the office of the Registrar of "Judgments, such judgment, or any execution thereon, shall be "deemed fraudulent and void against the assignees under such "commission."

Now, it must be conceded that the judgment in question here, though a judgment entered on a warrant of attorney, is not entered on a warrant duly filed pursuant to the 3 & 4 *Vic.*, c. 105; and that consequently it does come within the provisions of the 336th section; but then it was registered, as required by that section, within twenty-one days after its entry. The consequence is, that it is not avoided by the 336th section; that however of itself will not prevent its being avoided by the 334th, if that section applies to it. But then it is said that the 334th section is capable of being read, and ought to be read, as not applying to the judgment in question; and that is argued on the words in the 334th section, "the Courts in which judgment on such warrant shall *thereafter* be entered." The word "thereafter," it is said, means after the expiration of twenty-one days from the execution of the warrant of attorney mentioned in the 334th section; the effect of which would be, that the 334th section would only avoid those warrants on which judgments were entered after the twenty-one days, and would not apply to

them, or where judgment was entered within the twenty-one days, which would be regulated by the 336th section.

I think it can hardly be argued that this meaning of the word "thereafter" would be likely to suggest itself to any one on merely reading the 334th section; the only time mentioned in the section previously to the use of the word "thereafter" is the time of giving the warrant; and the word "thereafter" is actually interposed between the portion of the time of giving the warrant and the period of twenty-one days after its execution. I think therefore that, according to the ordinary rules of construction, it must be conceded that the word would be referred to the former time, and not to the latter. But this notwithstanding, I acknowledge that which is to be said for the suggested construction is well worthy of consideration. In the first place then it is said that it is but reasonable to suppose that whatever the words "Courts in Dublin in which judgment on such warrants of attorney shall thereafter be entered up" mean in the 3 & 4 *Vic.*, c. 105, s. 12, the same they must mean in the 334th section of the 20 & 21 *Vic.*, c. 60, which adopts them from it. Now, as they occur in the 3 & 4 *Vic.*, c. 105, the period of twenty-one days after the execution of the warrant is antecedently mentioned; and, though it be not the time next antecedently mentioned—the time next antecedently mentioned being the time of the execution of the warrant—yet when it is considered that, by the 13th section of the 3 & 4 *Vic.*, c. 105, any warrant of attorney on which judgment has been entered within twenty-one days after the execution of such warrant is saved from avoidance, though the warrant has not been filed pursuant to the 12th section; it seems, it is said, but a reasonable construction of the 12th section to confine it to warrants avoidable, viz., those on which judgment shall not have been entered within the twenty-one days.

It is further said that the 13th section of the 3 & 4 *Vic.*, c. 105, remains unrepealed up to this day, though no doubt qualified by the operation of the 334th and 336th sections of the 20 & 21 *Vic.*, c. 60. But taking these sections of the later Act, and reading them in connection with the unrepealed 13th section of the 3 & 4 *Vic.*, c. 105—which, while it takes validity from warrants of attorney not

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filed within the twenty-one days, if judgment have not been entered on them within that period of twenty-one days, leaves them unaffected if judgment have been entered within the twenty-one days—you have, it is said, consistent legislation. The 334th section taking validity perhaps more absolutely from the warrants not filed within the twenty-one days, if no judgments should have been entered on them within that time; but leaving validity to such as have judgments entered on them within that time, with the new qualification imposed by the 336th section, viz., provided such judgments be registered within twenty-one days after entry. Again, it is said that this is rendered still more probable by reference to the 335th section, which applies to a class of judgments not provided for by the 12th and 13th sections of 3 & 4 Vic., c. 105, but which it would seem to be the intention of the Legislature to put on the same footing—that is to say, judgments on cognovits, pleas of confession and consents for judgment; and which that section avoids against assignees, unless the cognovits, &c., be filed in the manner provided by the 3 & 4 Vic., c. 105, as to warrants of attorney, within twenty-one days after execution, *or unless* judgment shall have been entered and registered within that period of twenty-one days.

The whole argument depends, as it appears to me, on the construction to be given to the words “in which judgments on such warrants of attorney shall *thereafter* be entered up,” in the 12th section of the 3 & 4 Vic., c. 105. With reference to that, it seems to me the more natural mode of interpretation to refer the word “theretofore” to the time next antecedently mentioned; which would be the time of the execution of the warrant, and the end of the period of twenty-one days after its execution. And I think the mode in which the word “theretofore” is used in the 334th section of the 20 & 21 Vic., c. 60, merely as interposed between the mention of the time of giving the warrant, which succeeds it, and of the period of twenty-one days after the execution, which follows it, is a very strong argument that the Legislature understood it as referring to the former period. I can see no necessity in the Act 3 & 4 Vic., c. 105, of departing from the ordinary

mode of interpretation ; for I cannot conceive that the Legislature did not intend that the holder of a warrant of attorney might have the privilege of filing his warrant as provided by the 12th section, even though he entered his judgment within the twenty-one days after its execution. And, again, while I do not mean to say that I perfectly understand the provision in the 13th section which saves the judgments entered within the twenty-one days "in the Court in which such warrant of attorney shall have been filed," yet the addition of these words certainly renders more precarious the argument for interpreting the word "theretofore" out of the ordinary course, in the 12th section, by the help of the 13th. But, again, the 334th section of the 20 & 21 Vic., c. 60, applies not only to warrants of attorney, but to cognovits; in which it differs from the 13th section of the 3 & 4 Vic., c. 105; but the 335th section, which gives the alternative of either filing the instruments mentioned in it within twenty-one days, or entering judgment and registering it within the twenty-one days, does apply to cognovits, and gives that alternative to them, but not to warrants of attorney. I can hardly conceive that the Legislature, if it had intended anything like this with respect to warrants of attorney, would have left it to an implication from the terms of the 336th section, particularly as the period for registering the judgment is different in the 335th and 336th sections. But I confess it appears to me that one of the cases referred to, viz., *Acraman v. Herniman* (a) is an express authority on this point. That case was decided on the English Acts 3 G. 4, c. 39, and 12 & 13 Vic., c. 106. In that case a warrant of attorney, not filed in manner and form provided by the 3 G. 4, c. 39, but on which judgment was entered within twenty-one days after the execution of the warrant of attorney, was, on the bankruptcy of the party who had given it, held void, together with the judgment and execution on it. This decision must, it appears to me, be considered an express decision on the point, unless there be some substantial difference between the two English Acts mentioned, on the one side, and the 3 & 4 Vic., c. 105, and 20 & 21 Vic.,

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(a) 16 Q. B. 998.

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c. 60, on the other, in the provision relating to the matter in hand. The fourth section of the 3 *G.* 4, c. 39, is this:—"From and after the 29th day of September next, if the holder thereof shall think fit, any warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and endorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days next after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the Clerk of the Dockets and Judgments in the said Court of King's Bench." And then the second section does, in the case of a commission of bankruptcy issuing against the person who has given such warrant of attorney, avoid the warrant, and any judgment and execution thereon, against the assignees, unless it shall have been so filed within the twenty-one days, or unless judgment shall have been signed, or execution issued, within the same period. I have already stated the terms of the 12th section of the 3 & 4 *Vic.*, c. 105; and it will be seen that they are taken *verbatim* from the first section of the 3 *G.* 4, c. 39, except as to the time as to which the Act is to operate, and as to the Court in which the warrant of attorney is to be filed. Again, in both Acts the warrant is not avoided, provided judgment be entered within the twenty-one days: and, looking at both together, I confess I can entertain no doubt that the intention of the Legislature was to make the law of the two countries substantially the same, and that the word "hereafter" in the 3 & 4 *Vic.*, c. 105, merely forms a part of the description of the Court in which the warrant of attorney is to be filed; and that the only difference of the legislation is as to the Court in which the warrant is to be filed. The judgment on the warrant avoided by the second section of the English Act must have been a judgment "thereafter" entered in some sense, but not respecting a judgment thereafter entered in the Court in which the warrant was filed; because it might be a

judgment of the Common Pleas or Exchequer; and hence there was no use of introducing the word "thereafter" into the English Act. Again, the 131st section of the 12 & 13 Vic., c. 106, is this:—"If, after the commencement of this Act, any warrant of attorney to confess judgment in any penal action, or any *cognovit actionem* in any penal action, shall have been given by any such trader, and such warrant or *cognovit actionem*, or a true copy thereof, shall not have been filed with the officer acting as Clerk of the Dockets and Judgments to the Court of Queen's Bench, within twenty-one days next after the execution thereof, in manner and form provided by an Act passed in the third year of the reign of his late Majesty King George the Fourth, entitled 'An Act for Preventing Frauds upon Creditors by Secret Warrants of Attorney to Confess Judgment,' any such warrant of attorney shall be deemed fraudulent, null, and void, to all intents and purposes whatever."

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Now I have already stated the 334th section of the 20 & 21 Vic., c. 60; and it will be seen that, with the exception of the reference to the title of the antecedent Acts, and in the description of the Court in which the warrant of attorney is to be filed, they are almost virtually the same; for *Bryan v. Child*, already referred to, is an authority that the word "trader," in the English Act, means "trader becoming bankrupt."

It seems to me therefore that the decision in *Acraman v. Herniman*, in which case it was argued, as here, that the judgment on the warrant of attorney was valid under the provisions of the earlier statute, because the warrant only said the judgment was avoided by the latter, and in which that argument was overruled, is an express decision as to the effect of the 334th section of the 20 & 21 Vic., c. 60. A reference in the judgment of Mr. Justice Erle to the Irish Bankrupt Act (12 & 13 Vic., c. 109), then in force, was relied on in the course of the argument; but it is enough with reference to it to say that there is an inaccuracy in that reference, as reported, in reference to the 111th section of the Irish Act, and its applying to warrants of attorney at all. The then Irish Act left the law as to warrants of attorney as it was under the 3 & 4 Vic., c. 105. Both

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have the requisition in the 113th section that judgments on such warrants should be registered under the 7 & 8 *Vic.*, c. 90: and the repeal of the 12 & 13 *Vic.*, c. 107, and its introduction of the provisions in the 334th section of the 20 & 21 *Vic.*, c. 60, seems to me a further argument of the intention of the Legislature to make the law as to warrants of attorney the same in both countries.

On the whole, therefore, I am of opinion that the warrant of attorney, with the judgment and execution thereon, in the present case, must be deemed fraudulent, null and void, to all intents and purposes whatever; or, in other words, that we must deal with the case as if such warrant, judgment, and execution never had any existence.

Then comes the second question, whether the plaintiffs can take advantage of such avoidance in any of the forms of action contained in the plaint? There appears to me to be two counts of the plaint, in either of which the plaintiffs may have such remedy—the count for a conversion of the goods of the bankrupt, and the count for money had and received.

With respect to the first of these counts, the cases of *Acraman v. Herniman* and of *Dillon v. Evans*, already referred to, would be, to some extent at least, authority for that opinion, were it not for the case of *Young v. Billiter* (a), and in which it was held that a seizing of goods before insolvency, and avoided by the provisions of an English Insolvent Act (1 & 2 *Vic.*, c. 102) as against the assignees of an insolvent, could not be treated as void *ab initio*, so as to sustain an action for conversion of the goods of the insolvent.

Now it seems to me sufficient, as to that case, to say that all the Judges who decided it in the House of Lords were of opinion, upon the wording of the Act, which only avoided the transaction in question as against the assignees, that the action could not be considered as void to all intents and purposes whatsoever. But here we are dealing with an Act which does expressly relate to transactions null and void to all intents and purposes whatsoever. One, and one only, of the Judges (my Lord Wensleydale) expressed an opinion as to how the case would have been, had the transaction been held void to

(a) 6 El. & Bl. 1; S. C., on appeal, 8 H. of L. Cas. 682.

all intents and purposes whatever ; and no doubt the opinion of that very learned and eminent Judge was, that even in such case the action of conversion could not be maintained. I am far indeed from questioning the great weight due to this expression of opinion coming from such a quarter. I think it entitled to the greatest ; but I am bound to remember that it was an extrajudicial opinion in the case, and to bring the best of my own—certainly my inferior ability and knowledge—to the consideration of it, when it calls for judicial determination. Supposing the transaction void *ab initio* ; Lord Wensleydale seems to have been of opinion that the only remedy of the assignees would have been to seek the goods seized *in specie*, wherever they were to be found, as goods in which no property had passed from the insolvent. If that is to be applied to such provisions as that contained in the 334th section of the Irish Bankrupt Act, which avoids warrants of attorney given at *any time* after the commencement of the Act by a person who shall thereafter be declared a bankrupt, I cannot but see that the remedy, in the great majority of cases, would be wholly valueless. The ground of the opinion appears to have been that all the antecedent transactions would have to be treated as if they did not exist. I agree that the case is to be treated as if there were no warrant, no judgment, no execution ; but I cannot agree that the case is to be treated as if there were no taking and no sale in fact. The case, in my opinion (I say it with deference) is to be dealt with as if there were in fact, as there were, a taking and sale—but a sale without any legal authority whatever, and therefore tortious ; and consequently it seems to me that the action of conversion does lie for the tortious sale. No doubt it is a hard thing to be made a tort-feasor by relation ; but that is for the consideration of the Legislature : nor is there in it the measure of injustice which would at first appear, for the party making the seizure and sale must, if I rightly interpret the statute, be considered as one doing an act which he knew might be or not be tortious, according as the party whose goods he seized and sold should or should not become a bankrupt.

On the whole case, therefore, I am of opinion that the count for

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conversion of the goods of the bankrupt in the present case is sustainable; and, as the plaintiff may waive the tort, I think the count for money had and received would also be sustainable. Of course the plaintiffs cannot recover in both, and must elect; but, as the Common Law Procedure Act allows actions in tort and contract to be joined, it does not appear to me that any objection to the plaint arises from their being joined together here.

I think therefore that the judgment of the Court of Queen's Bench ought to be reversed.

CHRISTIAN, J., PIGOT, C. B., and MONAHAN, C. J., concurred with DEASY, B., in affirming the judgment of the Court of Queen's Bench.

Judgment of the Queen's Bench affirmed.

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 Reserved.*

COURT FOR CROWN CASES RESERVED.

THE QUEEN v. THOMAS FANNING.*

Nov. 18.
 E. T. 1866.
 April 17.
 May 3.

THE following case was reserved by Mr. Justice KEOGH and Mr. Baron HUGHES:—

The prisoner was indicted at the Commission held in and for the county of the city of Dublin, on the 25th of October last, for that he, on the 4th day of October, in the year of our Lord 1858, at St. Peter's parish church, in the county of the city of Dublin, did marry one Mary Stewart, spinster, and her the said Mary then and there had for his wife; and that the said Thomas Fanning afterwards, and whilst he was so married to the said Mary aforesaid, to wit, on the 23rd day of April, in the year of our Lord 1865, at the Roman Catholic church in Westland-row, in the county of the city of Dublin aforesaid, feloniously and unlawfully did marry and take to wife one Catherine Brien, and to her the said Catherine Brien was then and there married, the said Mary, his former wife, being then alive; against peace and statute.

Prisoner pleaded not guilty, and was defended by Mr. Curran.

First witness, Abraham Stewart, deposed—that he was a witness to the marriage in St. Peter's church, Aungier-street, in the city of Dublin, on the 4th of October 1858, of Mary Anne Stewart and the prisoner; they were married by the Rev. Mr. M'Sorley, a clergyman of the Established Church; he believed Fanning to be a Protestant; he represented himself to be a Protestant; Mary

Indictment for bigamy.
 A. was married to M. S., according to the rites of the Established Church, in 1858, and in April 1865, during the lifetime of M. S., he was married to C. B., in a Roman Catholic church, in Dublin. C. B. knew A. six months previous to the marriage, and believed him to be a Roman Catholic. He told C. B. that he was a Roman Catholic. He had been born and reared a Protestant, and had attended the Protestant service on Christmas morning 1865.

The jury found that A. was a professing Protestant within twelve months pre-

vious to the marriage, and that he had held himself out as a Roman Catholic to the clergyman who married him, and had told the woman he was a Roman Catholic; and they convicted him of bigamy.

Held—(MONAHAN, C. J., FICOT, C. B., KEOGH, and O'HAGAN, JJ., *dissentientibus*), that the conviction was bad.

* *Coram* MONAHAN, C. J., FICOT, C. B., KEOGH, CHRISTIAN, O'BRIEN, HAYES, JJ., FITZGERALD, HUGHES, BB., FITZGERALD, J., DEASY, B., and O'HAGAN, J.

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Second witness, Catherine Brien, proved—She knows the prisoner twelve months last Sunday; on the 23rd of last April he was married to her in Westland-row chapel; he told me he was a Roman Catholic; from the time she knew him he professed himself to be a Roman Catholic; they were called three times in the Roman Catholic church; she lived with him after the marriage, believing him to have been a single man previously to the marriage.

On cross-examination, and in reply to the question—Did he ever tell you he was a Roman Catholic?—Oh, yes, several times, both before and after the marriage; he never told me he had a wife and children before; did not know that till the time he was arrested; the prisoner lived in Donnybrook, and before we were married he used to come to see me at Merrion market; he never stayed all night before we were married; he went to chapel with me the night before we were married, and the day we were married; it is usual for Roman Catholics to go to the chapel the day before they are married.

And in reply to the question when the clergyman asked him—Was he a Catholic? did not you say he was an ignorant Catholic, and knew nothing at all? she replied, No; when the clergyman asked him was he a Catholic, he answered and said he was.

This closed the case for the Crown.

First witness for the prisoner, James Fanning, proved—He is the prisoner's father, and a Protestant; the prisoner is a Protestant; was baptized and reared a Protestant; never in his life knew him to be a professing Roman Catholic; he has come to church with witness: and on cross-examination he stated he had a son who went with the prisoner to church within the last twelve months; and last Christmas morning witness went with him to the Protestant church at Simmons'-court; and that on other occasions within twelve months witness had seen him go into the Protestant church.

Second witness, Thomas Scantlin, proved—Since he knew the prisoner he believed him to be a Protestant; I know him about

eleven or twelve years; never saw him go to church; by his expressions knows his religion; by expressions to witness believed him to be a Protestant; about six, or eight, or ten months ago, he told me he was a Protestant, in ordinary conversation.

Third witness, Thomas Goff—Knows the prisoner since he was born; he is a Protestant; witness is a Protestant; was with him in church very often; is unable to say whether he was in church with him these six months, but witness has been in church with him within the last twelve months.

Mr. *Curran*, on behalf of the prisoner, submitted that it had been proved the prisoner was a Protestant, or professed to be a Protestant, within twelve months before the second marriage, and that under the Act of Parliament the second marriage was void.

The Court called for the production, as a witness, of the clergyman who performed the second marriage ceremony.

The Rev. Mr. Barry, Roman Catholic clergyman, thereupon proved that he is one of the clergymen of Westland-row chapel, and married Thomas Fanning and Catherine Brien on the 23rd of April last; can identify Catherine Brien, but cannot swear to the prisoner; and in reply to the question—Are you able to state whether you asked him whether he was a Roman Catholic? witness replied, he presented himself as a Catholic, and therefore I asked him no questions touching his religion; he came in the ordinary course to be married; the banns were taken down, and the names published in the usual way.

At whose request were the names published, or the banns taken down?—At the request of the parties themselves. The banns were taken down by the Rev. Mr. Meyler. I asked the man no questions, as far as I remember.

And thereupon the Rev. Robert Meyler proved—I am one of the clergymen of Westland-row chapel.—[Banns produced.]—I took down that document at the request of the parties themselves, Fanning and Brien; I could not identify either the man or the woman. Are you able to state whether the parties from whom you took down the matter that composes that document stated anything

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about religion?—I am sure they did not; they came in the ordinary way as Catholics; as a matter of course, I took them to be Catholics, and I asked no questions of them; but I am sure I asked the man was he married before, and that he said he was not.

And, at the request of the jury, Catherine Brien was recalled, and in reply to the question—Did the prisoner tell you how long he was a Catholic before he was married? replied, he always told me he was a Roman Catholic, from the first hour we were acquainted; I asked him what religion he was; he said he was a Roman Catholic; I never knew he was a Protestant.

I charged the jury, and, in reply to questions of mine, the jury stated that the prisoner was a professing Protestant within twelve months prior to the time of the second marriage; and further, that they believed the prisoner had held himself out to the clergyman who married him as a Roman Catholic, and that he had stated to the woman that he was a Roman Catholic.

And I thereupon told the jury, that if they believed the prisoner had been a second time married, his first wife being still alive, as proved in evidence, they ought to convict him; and the jury found the prisoner guilty.

I sentenced him to five years' penal servitude.

I submit, for the consideration of the Court of Criminal Appeal, the legality of this conviction.

WILLIAM KEOGH.

Approved—H. G. HUGHES.

Molloy, for the prisoner.

The statute 19 G. 2, c. 13 (*Ir.*), is the principal statute on this subject. There are only two cases on it reported, *Hanley's case* (a) and *Regina v. Orgill* (b). The first marriage must be a legal marriage to constitute bigamy: *Regina v. Chadwick* (c). *Bruce v. Burke* (d) shows that if the order of the marriages here were reversed there should be an acquittal. Bigamy can only be committed where both the parties might be married if the former husband or wife were dead. The first

(a) Car. Cr. Law, 254.

(b) 9 C. & P. 80.

(c) 2 Cox Cr. C. 319.

(d) 2 Ad. 471.

statute on the marriage of Protestants and Roman Catholics is the 3 *W.* 3, c. 3. Then came the 6 *Anne*, c. 16, s. 6 (*Ir.*); 8 *Anne*, c. 3, s. 26; 12 *G.* 1, c. 3, s. 1. The 9 *G.* 2, c. 11, s. 6, prohibits the publication of the banns between Protestants and Papists. These statutes did not deal with the validity of the marriage at all; and then comes the 19 *G.* 2, c. 13, s. 1, which makes the marriage invalid: and a doubt arose whether, under the old statutes, a priest could be prosecuted for such invalid marriage, and the 23 *G.* 2, c. 10, was passed to enable a priest to be prosecuted for such an invalid marriage. This statute made it a capital felony for a priest to celebrate such a marriage. This left the law as follows in 1750:—marriages between two persons of different religion were invalid; it was illegal for the parties to contract them; the priest was punishable with death, and the Protestant clergyman was prohibited from publishing the banns. So the law remained till the first Catholic Relief Act, 32 *G.* 3, c. 21, which repeals several of these old Acts, and legalises intermarriage. The 33 *G.* 3, c. 21, s. 12, further extended this Act, but the Legislature still guarded against priests celebrating these intermarriages.—[MONAHAN, C. J. No doubt this second marriage was invalid; the only question is whether, even so, it is not bigamy.]—This statute is not content with declaring the marriage a nullity; it renders the priest incapable of establishing such a relation as that of marriage between the parties. He is in the position of a mere layman as regards the validity of the marriage. The 3 & 4 *W.* 4, c. 102, took away the punishment against the priest for such a marriage, but it left the prohibition against the marriage untouched. Then came the 7 & 8 *Vic.*, c. 81, which made the priest celebrating such a marriage guilty of felony; and the 7 & 8 *G.* 4, c. 28, s. 8, extended to Ireland by the 9 *G.* 4, c. 53, enacts that, where any act amounts to felony, and no punishment is fixed, the criminal may be transported. The law strips the priest of his function. In order to sustain this conviction, the Crown must contend that if a mere layman professed to celebrate a marriage between a Roman Catholic and a Protestant, that would be sufficient proof of a second marriage to convict the prisoner. In *Hanley's case*, except that the priest's marriage was the first one, the circumstances were the same as in the

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present case. In *Regina v. Orgill* (a) the priest's marriage was the second one. In that case it was contended that the prisoner having made an admission of his catholicity, he was estopped from denying it on the trial. *Flaherty's case* (b) affords some analogy on this point, where Pollock, C. B., says there should be some other proof of the first marriage besides the prisoner's admissions. The judgments in *Darcy's minors* (c) and *Thelwall v. Yelverton* (d) show that *Orgill's case* is not considered an authority in this country. It cannot be contended here that the prisoner's statement creates an estoppel, because it is no admission on his part that for twelve months preceding he had been a Roman Catholic, or had ceased to be a Protestant.—[CHRISTIAN, J. You have an actual finding of the jury that he professed himself a Protestant within twelve months. That serves your purpose, as well as if the jury had found he never was anything but a Protestant.]—Just so. The priest then was utterly incapable of enabling these parties to contract the relationship of husband and wife. It is this incapacity distinguishes the present case from *Brawn's case* (f).—[CHRISTIAN, J. I would call your attention to *Regina v. Burke* (e), where Burton, J., speaks in commendation of *Orgill's case*.]—Yes; but those were merely *Nisi Prius* decisions. In *Brawn's case* the clergyman had the power of celebrating the marriage; here he had not: the disability there lay in the parties, here in the clergyman. Suppose a marriage before the Registrar; a man brings the woman to the Registrar's house, and gets the Registrar's servant to go through the form. Would that support an indictment for bigamy? Take the case of a clergyman attempting to marry himself, as in *Beamish v. Beamish*.—[O'BRIEN, J. How is the priest in this case celebrating the marriage, not knowing he was doing wrong, to be distinguished from the clergyman in *Brawn's case*, who took it for granted that the marriage was a legal one, not knowing that one of the parties was the widower of the other's sister? Both marriages were made null and void to all

(a) 9 C. & P. 80.

(b) 2 C. & K. 782.

(c) 11 Ir. Com. Law Rep. 298.

(d) 14 Ir. Com. Law Rep. 188.

(e) 5 Ir. Law Rep. 549.

(f) 1 Cox, C. C. 34, and 1 C. & K. 144.

intents and purposes.]—In this case the parties can only contract marriage in a particular way.—[CHRISTIAN, J. There is this difference between the cases (I do not know that it is material), that in *Brawn's case* the marriage was void by reason of the disability of the parties to marry; in the present case the marriage is void, by reason of absolute disability in the person celebrating to solemnize it at all.—FITZGERALD, B. Is not it clear that if *Brawn's case* be law, the question as to the validity of the marriage in *Orgill's case* could not have arisen?—In *Brawn's case*, though the facts represented were true, it would not have been a valid marriage. In this case the truth of the facts represented would have made it a valid marriage.—[O'BRIEN, J. No; there is no ground for saying that the prisoner made a false representation. His representing himself a Catholic at the time is what the jury find, and that might have been true and the marriage invalid if he had professed Protestantism within twelve months.]—You must go the length of holding that a marriage *per verba de presenti*, or any marriage ceremony, even though by a layman, is sufficient evidence of a second marriage to render the party liable to a conviction for bigamy.

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Orgill's case has been pressed too far for the purpose of establishing that the representations made at the celebration of the marriage can make that a valid marriage which the law has declared invalid. I admit that representations cannot alter the law in these cases, though that was the view taken in *Regina v. Penson* (a). I do not contend for that here. What is the meaning of "marry" is the question. In all bigamy Acts the words are the same:—"Whosoever being married, shall marry any other person," &c. From the very nature of the case "marry" cannot mean a legal marriage.—[MONAHAN, C. J. Then "marry" does not mean the same as "being married."]—It comes to that. If a man goes through a ceremony purporting to be a marriage, which would be a marriage if all he represented were true, he is guilty of bigamy.—[O'BRIEN, J.

(a) 5 C. & P. 412.

M. T. 1865. Does that state of things exist here? Did his representations amount to anything to make the marriage valid?—He represented that the priest might marry him; that is all I contend for. *Regina v. Brown* was an *a fortiori* case, there the marriage could not by any possibility be valid: *Regina v. Penson* (a), and in the note there, *Regina v. Allison* (b). All these three cases establish that if the party represented such a state of circumstances as would enable the priest to marry, he is guilty of bigamy. I can only find one case where the point about the validity of the second marriage has been even raised in this country, *M'Inerney's case* (c).—[FITZGERALD, B., referred to *Graham's case* (d).]—If the ceremony which took place could by no possibility be a marriage, it might be fairly said that it was not a marriage within the meaning of the Bigamy Acts.—[FITZGERALD, B. Do you mean possibility arising from positive law, for it is only by positive law that a clergyman is required at a marriage ceremony?—Take the instance of a Scotch marriage out of Scotland. *Regina v. Orgill* does not rest upon estoppel; it puts the case on the same grounds as *Regina v. Brown*. It comes within the meaning of "doing all that in him lay to make it a valid marriage." The Judge says the marriage was good against him, that is such a marriage as enabled the Court to convict him of bigamy.—[CHRISTIAN, J. The only way in which I intended to find fault with that case in my judgment in *Thelwall v. Yelverton* was as to the doctrine of estoppel.—FITZGERALD, B. What is that but an estoppel, to say that the marriage is good to convict him?—CHRISTIAN, J. You do not estop; you say this is a marriage within the meaning of the Bigamy Acts, though not a marriage in any other sense.—PIGOT, C. B. What do you say to this argument, that no representation was made inconsistent with the invalidity of the marriage?—MONAHAN, C. J. Your argument comes to this, that, though the man admitted himself to be a Protestant, still it was bigamy.]—Yes; he went before a clergyman under such circumstances that the clergyman could celebrate the marriage.

(a) 5 C. & P. 412.

(b) Also reported in R. & B. 109.

(c) Ir. Cir. B. 270.

(d) 2 Lewin's C. C. 97.

Barry.

The meaning of the finding of the jury here is, that the prisoner substantially represented himself as a Catholic for all the purposes that would give validity to the marriage. *Graham's case* is cited in *Russell on Crimes*, vol. 1, p. 310, ed. 1865; and it appears there that the assent of the second wife was not clear, so that it was doubtful whether they meant a marriage at all or not.—[FITZGERALD, B. Was not the evidence gone into to show what constituted a valid marriage under the law of Scotland?]*Brawn's case* is followed in *Burt v. Burt* (a).—[FITZGERALD, B. So far as I know, a contract *per verba de præsenti* is a valid marriage according to the Common Law of Europe.]—But I do not go the length of *Brawn's case*.—[FITZGERALD, B. You must, unless you say that the representation here went to this, that he had professed Protestantism within twelve months.—CHRISTIAN, J. Bigamy in the Divorce Acts may be different from bigamy in the Marriage Acts; and that would explain *Burt v. Burt*.]*Regina v. Edwards* (b) was a strong case against the prisoner. That turned on 26 G. 3, c. 33, s. 8; the language there was as strong for the nullification of the marriage as here. From *Sullivan v. Sullivan* (c) cited in *Rogers's Eccles. Law*, p. 605, 2nd ed., it appears that though the marriage might be null and void by reason of the improper publication of the banns, yet a party was not allowed to rely on that ground of nullification, where the publication was his own act.—[FITZGERALD, B. Can you apply *Edwards's case* to a criminal case?]*There is no difficulty; whatever the man might say in a civil case as to the validity of the marriage, that is no answer to a prosecution for bigamy.*—[MONAHAN, C. J. You argue the prisoner was not estopped from relying on the invalidity, he might rely on it as much as he likes, it is no defence.—O'BRIEN, J. There was a case before Lord Tenterden as to misnomer.]—That was *Regina v. Inhabitants of Tibshelf* (d). I would put this case in a double aspect, whether it comes within *Edwards's case* or within *Brawn's*. *Regina v. Edwards* and *Orgill's case* amount to this, that if a man represents certain facts

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(a) 8 W. R. 552.

(c) 2 Hng. Cons. C. 238.

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(b) 1 Russ. & Ry. 283.

(d) 1 B. & Ad. 190.

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to be true, he cannot rely upon the non-existence of these facts as a defence to a prosecution for bigamy. *Regina v. Brawn* goes further, that, if the party does all that in him lies to give validity to the marriage, he cannot set up the invalidity. The only case against those is *Graham's case*, where there was no marriage at all.—[FITZGERALD, B. In all these cases the validity of the second marriage is discussed.]

Molloy, in reply.

Regina v. Inhabitants of Wroxton (a) shows that *Edwards's case* is no authority; for in the case of banns, both parties must know of the irregularity, to make the marriage void. The absolute inability of the clergyman to marry one of the parties here, in any case makes a difference between this case and *Brawn's case*, where the clergyman might have married either of the parties to any other person.—[PIGOT, C. B. How does that distinction affect the principle?—The absolute disability of the clergyman here to marry one of the parties, under any circumstances, took away even the semblance of a legal ceremony.

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The Court having expressed a wish to have the case re-argued, the case came on this day, when, in addition to the topics urged in the first argument*—

Constantine Molloy, for the prisoner.

The enacting parts of all the statutes, from the 10 *Car.* 1, sess. 2, c. 21, down to 24 & 25 *Vic.*, c. 100, s. 57, contain the same words:—“Whosoever being married shall marry.” The meaning of the words being married has been fixed by *Regina v. Chadwick* (b). In *The Queen v. Millis* (c) Chief Justice Tindal says those words “must of necessity point at and denote marriage of the same kind and obligation.” That opinion was pronounced in 1844, the year after *Brawn's case* was decided. Lord Denman's decision is opposed

(a) 4 B. & Ad. 640.

(b) 11 Q. B. 205.

(c) 10 Cl. & Fin. 689.

* *Coram* LEFROY, C. J., MONAHAN, C. J., PIGOT, C. B., KEOGH, CHRISTIAN, and O'BRIEN, JJ., FITZGERALD and HUGHES, BB., FITZGERALD, J., DEASY, B., and O'HAGAN, J.

to the whole train of authorities: *The Queen v. Robinson*, cited in *Regina v. Millis* (a); *The Queen v. Drake* (b); *The Queen v. Povey* (c).—[MONAHAN, C. J. In all these cases the question raised was whether, according to the law of the country the ceremony was sufficient; and if the ceremony was sufficient to constitute a valid marriage, it was held to be a good marriage; but there was no particular inquiry into the capability of the parties to contract the marriage.]—I quote those cases to show that the validity of the second marriage is a subject for inquiry. Baron Alderson said it was not. *Burt v. Burt* (d) was decided on the 20 & 21 Vic., c. 85, s. 27; it defines bigamy in the same language as the statute of Car. 1; and the Court decided that to constitute bigamy there must be proof of such a marriage as, but for the former marriage, would be a valid marriage: *Regina v. Orgill* (e) has been disapproved of in England as well as here: *Yelverton v. Yelverton* (f).

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D. C. Heron (with him *J. E. Walsh*), for the Crown.

I define the second marriage—a marriage, in fact that, except for some disability enacted by law, would be a valid marriage. If any ceremony had been gone through according to the law of the country, which, except for some disability personally to the parties, would be a valid marriage, the man who contracts a marriage of that description commits bigamy within the statute. Suppose the second marriage in this case was to be proved in a foreign country, the proof would be that the parties were then professing Catholic; that the banns were published in a Roman Catholic church; that a priest in orders married the parties. If proof were given of such a marriage in France, no question could be raised as to whether either of the parties had, for a single instant of the twelve months, professed Protestantism.—[CHRISTIAN, J. There is no disability here in the persons: the disability is in the priest, whose ceremony is null and void. There is no ceremony any more than if the priest was never

(a) Smythe & Bourke's R. 211 & 213. (b) 1 Lewin's Cr. C. 25.

(c) 1 Dears. Cr. C. 32; S. C. 22 Law Jour., M. C. 19.

(d) 2 S. & T. 88.

(e) 9 C. & P. 80.

(f) 10 Jur., N. S. 1215.

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in holy orders.]—According to the old rule of the Church, the sacrament of marriage does not depend on any ceremony by the priest, although the presence of the priest, and a ceremony by him in the face of the Church, is necessary in order to constitute a legal marriage. In the cases cited against Lord Denman's decision, all the objections went to the validity of the marriage; none of them turned upon any personal disability arising from an accident personal to any of the parties, disabling the priest from performing the ceremony. The disability may be one affecting either of the parties, rendering them incapable of marriage; or it may be one affecting the ceremony, if a ceremony was essential to the marriage. *The King v. Allison* (a) is an express decision in my favour; so is Baron Gurney's decision in *The King v. Penson* (b). This case is also within *The Queen v. Orgill*, for there was clearly a false representation.—[KEOGH, J. What is the meaning of the last finding, unless that the man falsely held himself out as a Roman Catholic, for the purpose of being married?—PIGOT, C. B. That he held himself out to be a Roman Catholic within the twelve months.—KEOGH, J. That he held himself out to be a Roman Catholic, and never anything else].

J. E. Walsh.

What is the evil the Legislature wanted to guard against? Take the recital of the 10 *Car.* 1:—"For inasmuch as divers "evil disposed persons, being married, run out of other of his "Majesty's realms and dominions into his realm of Ireland, or out "of one county into another within the said realm of Ireland, or into "places where they are not known, and there become to be married, "having another husband or wife living." It is this becoming to be married constitutes the gravamen of the offence, which is described as one "to the great dishonour of God, and to the undoing of divers honest men's children, and others." The guilt of bigamy does not depend upon the technical regularity *in omnibus* of the second marriage: *Duchess of Kingston's case* (c), where Sir Samuel Romilly's opinion on this subject is retracted. "Marry" must mean either of

(a) R. & R. 109.

(b) 5 *Car.* & P. 412.

(c) 20 *State Trials*, 514.

two things—either going through a ceremony that might be a marriage,—going through it with all the circumstances of a religious rite, whether valid or not—or it may mean doing something by which the parties are made man and wife, and their children legitimate. There is nothing between these two meanings.—
 [KEOGH, J. Suppose two persons go through a ceremony of marriage before a person representing himself as a clergyman, but who turns out to be an imposter, what is the effect of that ceremony?]
 There is no authority. *Brawn's case* has been law for twenty years, and must be overruled if you decide against the Crown.

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Molloy, in reply.

Orgill's case is an authority against *Brawn's case*; for, if *Brawn's case* was law, there would be no occasion to resort to the novel doctrine of estoppel. As to the meaning of “be married,” and “marry,” take the title of the statute of *Car. 1*—“An Act to Restrain Persons from *Marriage* till their former Husband or Wives are dead.”

Cur. adv. vult.

O'HAGAN, J.

This case comes before the Court upon a question reserved by my Brother KEOGH, as to the conviction of the prisoner Thomas Fanning, at the Commission for the county of the city of Dublin, on the 28th of October last. That question arises, substantially, upon the construction which should be given to the provisions of the 24 & 25 *Vic.*, c. 100, s. 57, in connection with the facts established in evidence. Those facts appear to have made it plain, that the prisoner was legally and validly married, at St. Peter's parish church, to Mary Stewart, who thereupon became and now is his wife; and that, subsequently, he went through the ceremony of marriage with another woman, Catherine Bryan, who was a Roman Catholic. The latter marriage was solemnized, according to the rites of the Roman Catholic Church, by a Catholic priest. The prisoner professed himself a Roman Catholic. The person with whom he married believed him to be so. The ceremony had all the incidents of a regular and binding marriage, and would have operated effectually

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as such, but that the prisoner was really a Protestant, or had so declared himself within twelve months before it took place. Therefore the second marriage was rendered, by the 19 G. 2, c. 13, s. 1—one of the last few lingering remnants of the Penal Code—"absolutely null and void, to all intents and purposes." And it is contended that, because it was a nullity, the prisoner committed no legal offence in going through the form of marriage, and perpetrating the fraud and inflicting the injury which, through that desecrated form, he was enabled to accomplish upon the woman, whom he induced to believe herself his wife. The charge against the prisoner, as was observed at the Bar, is properly that of polygamy, and not of bigamy. A bigamist, in the old and true meaning of the canonists, is a man who marries two women successively, or a man who marries a widow. A polygamist is a person who has two wives, or more, at the same time; and the aim of the statute, with which we have to deal, is to prevent any one from entering into a second marriage while the first subsists. Originally, offences of this kind were only of ecclesiastical cognizance; and it was not until the Act of the 10 Car. 1 (*Ir.*), sess. 2, c. 21, that they became punishable by the civil power in this kingdom. The nature of the punishment was varied from time to time; but the statutable definition of the crime has continued substantially the same, in the subsequent Acts of the 10 G. 4, c. 34, and the 24 & 25 Vic., c. 100, s. 57, under which the indictment in the case before us has been framed. All the Acts, for the purpose of construction, may be considered together; and they must be construed according to the legal acceptation of their terms, and with the strictness which properly attaches to gravely penal statutes.

The Act of Car. 1 is entitled "An Act for the Restraining of all
 "Persons from Marriage until their former Wives and former Hus-
 "bands be dead;" and it recites that, "Forasmuch as divers evil
 "disposed persons, *being married*, run out of others of his Majesty's
 "realmes and dominions into the realme of Ireland, or into places
 "where they are not known, and there *become to be married*, having
 "another husband or wife living, *to the great dishonour of God,*
 "*and utter undoing of divers honest men's children, and others?*"

and then the enactment is that, "If any person or persons, *being* M. T. 1865.
"married, or which shall hereafter marry, doe marry *Crown Cases*
"any person or persons, the former husband or wife being alive, *Reserved.*
"every such offence shall be felony; and the offender shall suffer THE QUEEN
"death." The statute then creates certain exceptions, with which, v.
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 The offence is stated, both in the 2 G. 4, c. 34, s. 26, and the
 24 & 25 Vic., c. 100, s. 57, as that of a person who, "*being mar-*
ried, shall marry any other person during the life of the former
 "husband or wife." Upon these words, and upon the recital and
 the terms of the original Act of Car. 1, arises the controversy in
 the case before us.

On the one side, it is contended that, the second marriage being
 statutably void, to all intents and purposes, there can be no bigamy;
 on the other, that, notwithstanding its invalidity in law, the second
 marriage, having been a marriage in fact, having had all the outward
 character and sanction of a religious ceremony, and being avoided
 only because of a circumstance fraudulently concealed by one of the
 parties, constituted the offence which the Legislature has sought to
 prevent and punish.

Some authorities have been cited in support of these views
 respectively, to which I shall briefly advert. They are all compa-
 ratively of recent date; and they have various degrees of pertinency
 to the argument. Two of them, at least, are expressly in point; and
 if they put the true construction on the statute, the conviction was
 legal, and ought to be maintained.

In the case of *Rex v. John Penson (a)*, at the Maidstone Assizes,
 the prisoner was indicted for bigamy. He had married Anne
 Wootton, and afterwards *Eliza Brown*, who assumed the name of
 Julia Huth when the banns were published, for the purpose of
 concealment from her neighbours. The prisoner's Counsel insisted
 that, on this account, the second marriage was void *ab initio*, and
 of this there was no doubt; and then he contended that, in order to
 constitute the offence of bigamy, the second marriage should possess
 all the requisites of a valid one, save for the inability of the party to

(a) 5 Car. & P. 412.

M. T. 1865. contract it, from having a former husband or wife living. There-
Crown Cases fore, he argued, there being no second marriage, the offence of
Reserved. bigamy had not been committed. But Gurney, B., who tried the
 THE QUEEN case, answered :—" *That applies only to the first marriage ;* and I
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" am of opinion that parties cannot be allowed to evade the punish-
 " ment for an offence, by contracting a concertedly invalid mar-
 " riage." That case appears to me undistinguishable from the
 present. In it, as in this, the second marriage was absolutely
 null and void ; and the very argument relied on before us by the
 prisoner's Counsel, and the precise construction of the statute which
 they urge us to adopt, were there also pressed upon the Court.
 The decision, *quantum valeat*, is directly in support of the conviction ;

And so is the case of *Regina v. Brawn (a)*. There the indictment
 was for bigamy. The prisoner, Jane Brawn, had married Thomas
 Beares, and afterwards Thomas Webb. Thomas Webb was the
 widower of the sister of Jane Brawn ; and, under the statute
 5 & 6 W. 4, c. 54, s. 2, the second marriage was " absolutely
 null and void, to all intents and purposes whatsoever." The pri-
 soner's Counsel there, as here and in *Panson's case*, insisted that,
 as there was no second marriage, there could be no bigamy ; but
 Lord Denman, C. J., said :—" I am of opinion that the validity
 " of the second marriage does not affect the question. It is the
 " appearing to contract a second marriage, and the going through
 " the ceremony, which constitutes the crime of bigamy ; other-
 " wise it could never exist in the ordinary cases, as a previous
 " marriage always renders null and void a marriage that is cele-
 " brated afterwards by either of the parties during the lifetime of
 " the other. Whether, therefore, the marriage of the two prisoners
 " was or was not in itself prohibited, and therefore null and void,
 " does not signify ; for the woman, having a husband then alive,
 " has committed the crime of bigamy, by doing all that in her
 " lay, by entering into marriage with another man." This also,
quantum valeat, is an express authority upon the very point in
 controversy here. There, as in this case, the second marriage
 was absolutely void ; and if, notwithstanding, the conviction was

(a) 1 C. & K. 144.

right, it is impossible to say that the judgment against the prisoner ought to be reversed.

Two other cases—*Rex v. Edwards (a)*, and *Rex v. Allison (b)*—have also been relied upon by the Counsel for the Crown, and come in aid of the decisions to which I have referred; but I do not occupy time in discussing their details. The substantial question is, were the cases of *Penson* and *Brawn* rightly decided; or is this Court prepared to overrule them? .

After much consideration, and not without the serious doubt, which is naturally engendered by my knowledge that I differ from a majority of my Brethren, I have come to the conclusion that those decisions should be maintained, and the conviction affirmed accordingly. They are, it is true, the decisions of single Judges delivered upon Circuit, and in no way coercive on this Court of Appeal, to which it is entirely competent to review and reverse them; but, for my own part, I think I see good reason to hold that they are sustained by the application of established rules of construction to the Bigamy Statutes, and by a true regard to the object and policy which those statutes were framed to carry into effect. I observe, first, that though the decisions were made by single Judges, those Judges were both men of great ability and large experience in the administration of the criminal law; and their undoubting judgments are entitled to much respect. Secondly; those decisions were made in the only cases in which the precise question now before us appears to have been ever distinctly raised. Several other authorities have been cited by the Counsel for the prisoner, to which I shall by and by briefly advert; but I have not discovered that any of them decides that question, or, in my apprehension, directly bears upon it. Thirdly; the ruling made in *Penson's case* was made thirty-four years since, and the ruling in *Brawn's case* nearly a quarter of a century ago. I do not find that during the long intervening periods, the one or the other has been called into question; and in the latest and most authoritative text-book on *Crimes*, published last year, and edited by Mr. *Graves*, the eminent counsel who prepared the Criminal Law Consolidation and Amendment Acts, the judgment

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E. T. 1866. of Lord Denman in *Brawn's case* is adopted, without doubt or
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Reserved. qualification, in its entirety, as giving the true construction to the
 THE QUEEN provisions of those Acts which we are now discussing. Of course
 v. there is nothing conclusive in this; but it is an indication of the
 FANNING. opinion of the profession in England not unworthy of attention.

For these reasons, it seems to me that the decisions of Lord Denman and Baron Gurney are perhaps clothed with more authority, and entitled to greater respect than always attach to judgments pronounced on Circuit, or in the confusion of *Nisi Prius*. But, if it be clear that they have construed the statutes wrongly, it is our duty, nevertheless, utterly to disregard them. Is it so clear? I do not think so.

What meaning are we to assign to the words in the 24 & 25 Vic., c. 100, s. 57, "whosoever *being married* shall *marry* any other person"? Is the same meaning to be put upon "being married" and "marry;" or are we at liberty to give the words a different meaning? The first marriage, regarded by "being married," must *ex concessis* be legally valid, or there can be no bigamy. Must the second marriage, regarded by "shall marry," be also legally valid, for the purpose of establishing the crime?

It is impossible to contend, absolutely and universally, that it must be so; for both by the Common Law and the Law of the Church, and without the intervention of the Statute Law at all, the second marriage, living the first wife, was always null and void, to all intents and purposes. Therefore, if the same meaning *quoad* the validity of the marriage must be given in all cases to the words "being married," and "shall marry," there never could be a conviction for bigamy, as in every case the second marriage must be invalid. And on this account, *ex necessitate rei*, and to prevent the law from utter defeat and uselessness, it is said that, in the one case of nullity of the second marriage, because of the first, it should be sufficient for the purposes of prosecution; but, in every other case of its nullity for any other cause, it does not avail for such purposes, and, creating no crime, warrants no punishment.

Now, I think the construction thus necessarily given, from the universal invalidity of the second marriage, is plainly right; but I

do not see why, having abandoned in one instance the proper and literal meaning of the word "marry," as implying an actual and lawful marriage, with the view of making the legislation effective, we should be bound, in every other, to attach to it that meaning rigidly, with the manifest result of giving impunity to crime which the statute was framed to suppress, and withdrawing the protection with which it ought to guard the innocent and unwary. The word "marry" must be held, in one case, to regard not a real marriage, but a pretended marriage—the show or *simulacrum* of a marriage. Why should it not be held, in other cases also, to be applicable to a ceremony having all the external marks of ecclesiastical and legal validity, but void from a concealed impediment, and fraudulently used for purposes of vile deception?

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Regard the title of the statute of *Car. 1*, "An Act for Restraining of all Persons from *Marriage* until their former Wives and former Husbands be dead." From what *sort* of marriage was the restraint to be? Not from a legal marriage, for there could be none; not from a real marriage, for the continuing existence of the former wife or husband made this impossible. Must it not have been from a pretended marriage—a marriage with all the form of reality, but without the substance—a mere delusion and a sham? And when the statute proceeds to describe evil disposed persons who, being married, run into places where they are not known, and "*become to be married*," it does not contemplate merely that they really and actually "*become to be married*," which they could not be; but that they go through the form of marriage, or, in Lord Denman's words, "*appear to contract*" it.

It seems to me, therefore, that the construction for which the Crown contends is not unreasonable, regard being had to the words of the statutes, and the admitted impossibility of giving them any effect, if the word "marry" be taken, universally, to have the meaning which the argument for the prisoner requires us to put upon it.

And then, when we consider, as we are at liberty to do, their true aim and object, the argument for that construction appears to me to be materially aided. A very eminent jurist, Sir Samuel Romilly,

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describes the crime of bigamy in these striking words :—" The real nature of this crime is that of a fraudulent and most aggravated seduction, effected under colour of law, with all the solemnities of religion, and under such circumstances that no caution or prudence could effectually guard against it." And the framers of the original statute of *Charles* appear to have viewed the offence with no greater favour, for they describe it as perpetrated "to the great dishonour of God, and utter undoing of divers honest men's children, and others." Now, I repeat, we may look not only to the title, but to the preamble of this statute, for the purpose of reaching its true construction, by an ascertainment of the mind and purpose with which it was enacted; and it appears to me, that the offence with which we are dealing, "effected under colour of law, and with all the solemnities of religion," although invalidated by an old Act of Parliament, was not less to the dishonour of God, and the utter undoing of innocence, than if that Act of Parliament had never existed, and the marriage had been void, only because of the celebration of that which had preceded it. The case seems plainly within the mischief which the statute contemplates; and I am not, on that account, the less willing to refuse to aid in the reversal of decisions which appear to me to effectuate its purpose, whilst they are warranted by its terms.

It would be a grave reproach to our law, if, for so many generations, it had left such wrong without remedy, such crime without punishment, as those which have been perpetrated in the case before us; and I confess I revolt from a construction of the statutes which would permit any scoundrel, calling himself a Catholic, to indulge his cupidity or his lust by possessing himself of the fortune and the person of an innocent woman, during the lifetime of his wife, with absolute impunity; provided, only, that he shall take the precaution of declaring himself a Protestant at any time within twelve months before his second marriage,—and this not publicly, or so that it may be possible for his intended victim to know anything of the fact. If he did not so declare himself, the second marriage, though utterly void, would subject him to the penalties of the crime; but,

upon the view presented for the prisoner, he may evade those penalties—that marriage remaining just as void, and no more so, in both sets of circumstances—if he adds to the fraud and treachery involved in every bigamy the accumulated baseness of professing, it may be as falsely as clandestinely, a form of faith different from that which he appears to hold, for the very purpose of shielding himself from punishment. Of course, we are not to legislate, but to declare the law, and, if it be clear, without regard to consequences; but I confess it is, to my own mind, satisfactory that I am enabled, by sufficient authority,—sustained, as it seems to me, by legal principle and fair interpretation of the words of the statute,—to avoid a construction which must be pregnant with such startling and lamentable results.

A number of cases have been cited in argument for the prisoner; but, as I have said, I do not conceive that by any one of them the decisions to which I have adverted have been over-ruled, nor are there any others in which the precise question before us has been raised and decided.

We have been referred to the judgment of Chief Justice Tindal in *The Queen v. Millis* (a); but, in that case, the Judges having come to the conclusion that the first marriage, being merely *per verba de presenti*, and without the intervention of a clergyman *sacris ordinibus institutus*, was null and void, of course they were bound to hold that the offence of bigamy had not been committed. That was the matter really decided by them; and though Chief Justice Tindal goes on to give his opinion that the words “being married” in the first clause, and the words “marry any other person” in the second, point out and denote marriage “of the same kind and obligation,” that opinion was offered without any consideration of such a controversy as has arisen here as to a second marriage, apparently of the same kind and obligation with the first, celebrated by a clergyman in holy orders and with all the solemnities of religion, but rendered invalid by the operation of a penal statute, on a state of facts which was fraudulently concealed. The opinion, though entitled to all respect, is not decisive on a question

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(a) 10 Cl. & Fin. 688.

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which was not present, when it was given, to the minds of the Judges, and it seems to have been meant only as a protest against the doctrine that a contract *per verba de presenti*, and nothing more, without any ceremony whatever, twice repeated by the same person, could make him subject to capital punishment. I do not, therefore, think that the high authority of Chief Justice Tindal and the English Judges contravenes the decision of Lord Denman, who was present as one of the Law Lords at the hearing of *The Queen v. Millis*, in the very year after the trial of *The Queen v. Brawn*, who gave judgment in the House of Lords after he had heard the opinion of the Judges, probably found no conflict, in the statements to which I have adverted, between that opinion and his own as to the nature of bigamy, although he differed from them as to the great question on which they were called to advise the Lords. Indeed, the concluding passage of Lord Denman's judgment in *The Queen v. Millis* is worthy of attention, as indicating, in its peculiar phraseology, that he continued to maintain the distinction between the first and second marriage, for the purpose of a prosecution, which he had taken in *The Queen v. Brawn*. He says:—"If the "first marriage be good for any purpose, it is good for the purpose "of rendering him who commits the vicious and cruel act of "deserting one wife *and deceiving another woman by the pretence "of a marriage*, a criminal in the eye of the law. The offender "takes his chance whether his first contract will be held a *marriage*, and whether his second will be held a *crime*; and, not "more ignorant than other offenders, he must abide their fate." Lord Denman manifestly remained of opinion, that the essence of the criminality of the bigamist, in the eye of the law, consists in the vicious and cruel deception of a woman by the fraudulent "pretence of a marriage." *The Queen v. Millis* does not, therefore, appear to me to furnish ground for disturbing the conviction.

Two other cases were cited from the report of *The Queen v. Millis* in the Court of Queen's Bench, by *Smythe & Bourke*, pp. 184-5, as having been decided by Judge Torrens and Baron Foster upon Circuit; and many of a similar kind will be found in Lord Campbell's judgment in *The Queen v. Millis* in the House of

Lords. These cases show, that the Judges have ordinarily required proof of the general validity of both the ceremonies of marriage—the first and the second—to found a conviction for bigamy; and it was right that they should do so, because “the pretence of a marriage”—to borrow again Lord Denman’s phrase,—for the purpose of deception, must be the pretence of a *valid* marriage, although it may be legally avoided; and, in any view of the matter, such a marriage, apparently valid but really void, must have been performed or there can be no criminality. It was fit and necessary, therefore, that inquiry should be made as to the character of the second ceremony; for every sort of contract, and every form of mutual engagement, cannot be taken either to create the actual relation of husband and wife, which is essential in the first marriage of the bigamist, or that seeming relation, in the second, which is necessarily sufficient to make it the subject of punishment. In none of those cases, however, was there any mooted of the question as to the effect of a ceremony ordinarily constituting marriage, but, in certain conditions, failing of all effect, and fraudulently employed for a criminal purpose. The same observations will be found to apply to the cases of *Regina v. Povey (a)* and *Burt v. Burt (b)*. In neither of those cases was any question discussed like that before us. Just as in the Irish cases, the Judges required, in *Regina v. Povey*, the evidence of a third witness as to the recognised validity of the form of a second marriage; and, in *Burt v. Burt*, they declined to recognise, without such proof of its ordinary sufficiency, a ceremony performed in Australia, as constituting marriage for the purposes of bigamy. Formally, it is stated in that case, which seems to have been scarcely argued, that the second marriage should be such as, being apparently valid, but for the first would have been really so. And such it, generally, is. But the Judges had no occasion to consider, and they did not consider or decide, what would be the effect of such a second marriage, of as much apparent validity as the former, concocted in as gross a fraud and working as much mischief—but invalidated for a different reason—as in the case of this conviction. In all the Irish and English cases

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(a) 1 Deare. C. C. 32.

(b) 2 S. & T. 88.

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cited for the prisoner on this branch of the argument, it merely appears that some proof was required as to the validity of the ceremony, according to the local or the general law; but, in none of them, was it considered or determined how far the incompetency of the parties to contract, or of the priest's validity to celebrate, in particular circumstances, would affect the operation of the second marriage, with relation to the Bigamy Statutes. It seems to me, therefore, that the authority of *The Queen v. Brawn* is not affected at all by those decisions.

I have not, so far, referred to *The Queen v. Orgill* (a), which was relied on at the trial, and much discussed in the argument before us. And I have abstained from doing so, because I do not mean to rest my judgment at all upon it. It is, in the first place, clearly distinguishable from the case before us. The prisoner there, on the occasion of the second marriage, stated to the priest that he was a Catholic; and Baron Alderson said that, "If at the time of the "second marriage the prisoner declared himself to be a Roman Catholic, it is a good marriage as against him. If the prisoner "at the time of his marriage held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his "Protestantism as a defence to the charge." That case has been disapproved of by the LORD CHIEF JUSTICE of the Common Pleas in *Darcys minors* (b), and by my Brother CHRISTIAN in *Thelwall v. Yelverton* (c). I concur with them, in declining to accept it as an authority. There was apparently no proof offered in it of the falsehood of the prisoner's allegation that he was a Roman Catholic; whereas, in the present case, there is clear evidence to negative an assertion of a similar kind; and I do not think that the doctrine of estoppel under such circumstances can be applied against a prisoner, even if it were applicable here, as I apprehend it is not, on the ordinary rules which govern its application even in a civil case. I observe that, in *Yelverton v. Yelverton* (d), in the House of Lords, Lord Wensleydale agrees in the opinion of Chief Justice MONAHAN as to the doubtful character of the decision in *The Queen*

(a) 9 C. & P. 80.

(b) 11 Ir. Com. Law Rep. 306.

(c) 14 Ir. Com. Law Rep. 207.

(d) 10 Jur., N. S. 1215.

v. *Orgill*; and I desire to be understood as resting my judgment, in no way, upon that decision. I rest it upon the substantial reasons which seem to me to sustain the conclusions of Baron Gurney in *The Queen v. Penson*, and of Lord Denman in *The Queen v. Brawn*—on the hitherto unshaken authority of those cases, after so great a lapse of time,—on the impossibility of carrying to its consequences the argument for the prisoner as to the identical effect of the words “being married” and “shall marry,” without a virtual repeal of the statute,—and, this being admitted, on the propriety and legitimacy of giving to the words “shall marry” such a construction as may effect the true purposes of the statute, by preventing or punishing almost the worst of imaginable deceptions, accomplished by the making of a marriage apparently valid, but really void.

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I am, therefore, of opinion that the conviction was legal, and ought to be sustained.

DEASY, B.

The question in this case is, whether the conviction of the prisoner for bigamy can be sustained; and I am of opinion that it cannot. The fact of the first marriage, and its validity, are not disputed. The second marriage, for which the prisoner was convicted, was celebrated by a Roman Catholic priest, and the prisoner, as the jury have found in answer to a question left to them by the Judge, was a professing Protestant within twelve months next before the celebration of that marriage. By the 19 G. 2, c. 13, s. 1, every such marriage is declared to be absolutely null and void to all intents and purposes whatsoever. In any Civil or Spiritual Court, therefore, the marriage, for entering into which the prisoner has been convicted, has none of the qualities of a marriage. It created and conferred no rights or obligations upon either of the parties to it, wholly independent of the first marriage, and the issue of it would be illegitimate, even if such first marriage never had existed, it is difficult to conceive how a ceremony which, however solemn, never could have legally created the status of husband and wife

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between the parties to it, can be regarded in a Criminal Court as a second marriage within the meaning of the Act 24 & 25 *Vic.*, c. 100, s. 37. The words of that Act, and they are identical with those of the former Acts, the first of which in Ireland is the 10 *Car.* 1, c. 21, are, "Whoever, being married, shall marry any other person during "the life of the former husband or wife, whether the second marriage "shall have taken place in England or Ireland, or elsewhere, shall be "guilty of felony." Now, that the word "married," occurring in the first part of that sentence, means legally married is not and cannot be disputed: and the question is, whether the word "marry," occurring in the second branch of it, can mean anything else than a marriage of a similar character with that of the first, but rendered invalid only by the existence and validity of the first. Now, what was it that the Act intended to prevent by the fear of the punishment which it imposes? Was it not the entrapping of innocent persons into a contract of marriage which they may have reason to believe valid, and conferring upon them the status and the rights of married persons, and which is rendered invalid by the existence of a former marriage? But the reason for making that a criminal offence does not apply to the performance of a ceremony which, independently of any such prior marriage by the general law of the land in which the parties live, and which they must be presumed to know, is wholly invalid, confers no rights, and creates no obligations.

The Act of Parliament, in cases like the present, has divested the Roman Catholic priest of the power, which in other cases he possesses, of solemnizing a valid marriage, and renders the ceremony gone through before him of no more legal validity than if it had been performed by or in presence of a mere layman.

Independently of authority, therefore, I should come to the conclusion that the marriage ceremony relied on by the Crown, as constituting the crime of bigamy, cannot be considered in a Criminal Court otherwise than it admittedly would be in a Civil Court, that is, in the language of the Act of Parliament, as null and void to all intents and purposes,—imposing no obligations, creating no rights, and constituting no crime.

Two cases have however been cited as authorities in support

of the conviction—the case of *Rex v. Penson* (a), and *Regina v. Brown* (b); and in each of those cases a ceremony of marriage, which was made void as a marriage by statute, was held sufficient to constitute the crime of bigamy. But both of those were decisions of single Judges on Circuit, apparently made without argument, and without consideration; and, even if there were no authorities the other way, I do not think they ought to be followed by this Court. But there are other cases in which the validity of the second marriage—that is, its validity if there were such a prior marriage—was held an essential ingredient in constituting the crime of bigamy. Thus, in *Drake's case* (c) the prisoner was indicted for marrying Hannah Wilkinson in the lifetime of his first wife. It was proved, by a person who was present at his second marriage, that the woman was married to him by the name of Hannah Wilkinson; but there was no other proof that the woman in question was Hannah Wilkinson. Parke, J. (now Lord Wensleydale), held the proof to be insufficient, and directed an acquittal. The learned Judge, adds the reporter, subsequently expressed his decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that he was then and there married to a certain woman by her name of, and who called herself Hannah Wilkinson, because the indictment undertakes that Hannah Wilkinson was the person; whereas in fact there was no proof that such was her name, or that she had ever before gone by that name; and, if the banns had been published by a name not her own, and which she had never gone by, the marriage would be invalid. So that that eminent Judge was of opinion that the unbroken invalidity of the second marriage, considered *per se*, constituted a good defence to a charge of bigamy which rested on such a marriage. Again, in *Graham's case* (d), on an indictment for bigamy, the second marriage relied on was at Gretna Green. The evidence showed that the prisoner and the woman went to Gretna Green, and there were married in the presence of the innkeeper and his wife, as the latter expressed it,

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(a) 5 C. & P. 412.

(b) 1 C. & K. 144.

(c) 1 Lewin, 25.

(d) 2 Lewin, 97.

E. T. 1866. "after the manner of the law of England." The ceremony was read out of the Prayer-book, or part of it. A writer of the Signet was called to prove the validity of the marriage according to the law of Scotland; and part of that evidence was, that the assent of both parties must be distinctly and clearly proved to have been given, in order to render the contract a valid one. Alderson, B., being of opinion that the assent of the second wife was not distinctly and clearly proved, directed the jury to acquit the prisoner. So that he too must have been of opinion that the unbroken validity of the second marriage was essential to constitute the crime of bigamy. Again, in the case of *Regina v. Povey* (a), the second marriage relied on was in Scotland; and the Court of Criminal Appeal, consisting of Jervis, C. J., Alderson, B., Coleridge, J., Cresswell, J., and Platt, B., held that some one conversant with the law of Scotland should have been called to prove that, according to that law, what took place in Scotland constituted a valid marriage; and for want of such evidence the prisoner was acquitted. The case of *Burt v. Burt* (b) is a very direct authority to the same effect. The Act establishing the Divorce Court makes bigamy one of the grounds of the dissolution of marriage; and it defines bigamy, marrying a second husband or wife in the life of the former. In that case bigamy was one of the grounds on which a divorce *a vinculo* was sought: proof was given that the respondent went through a ceremony of marriage at Melbourne; that many persons were married there according to that form, and lived together as married persons; and a certificate of the marriage; but there was no proof of the law of Australia. The Court, consisting of Cresswell, J., Martin, B., and Willes, J., held it insufficient, and said:—"We cannot consider the bigamy as proved. There must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage. In the absence of formal proof of the law of Australia, we cannot consider the bigamy proved." It is impossible to distinguish that case from the present; for the definition of bigamy, on which that case was decided, is identical with that in the Act on which the prisoner

(a) 1 Dears. C. C. 32.

(b) 2 S. & T. 288.

was convicted. To these I may add the authority of Tindal, C. J., E. T. 1866. who, in giving the opinion of the Judges in the House of Lords, *Crown Cases Reserved.* in *The Queen v. Mills* (a), thus expresses himself. Having answered the first question as to the validity of the first marriage, he proceeds:—"Independently altogether of the answer we have given to that abstract question, and admitting, for the sake of argument, that the law had held a contract *per verba de presenti* to be a marriage, yet, looking to the words of the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are, 'If any person, being married, shall marry any other person during the life of their first husband or wife,'—words which are almost the same as those in the original statute of *James*. Now the words 'being married,' in the first clause, and 'marry any other person,' must of necessity point at and denote marriage of the same kind and obligation." These expressions clearly indicate that the eminent Judge who introduced them into a most carefully prepared judgment did not consider that a marriage ceremony or contract which was of no obligation, but absolutely null and void to all intents and purposes, would be sufficient to constitute the crime of bigamy; and the words of the Act which he cited are identical with those of the Act under which the indictment in the present case is framed. Those authorities I think outweigh those relied on by the Counsel for the Crown, and fortify the opinion which, independently of all authority, I would have formed upon the words of the two Acts—the Irish Act of 14 G. 2, c. 13, and those of the 24 & 25 Vic., c. 100, viz., that a marriage that is expressly made null and void to all intents and purposes, by the former, does not constitute the crime of bigamy within the meaning of the latter.

But there is another ground relied on by the Counsel for the Crown, as entitling them to sustain this conviction; and that is, that the prisoner having on the occasion represented himself to the priest who married him, and to the woman with whom he inter-

(a) 10 Cl. & Fin. 688.

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married, as a Roman Catholic, is estopped from setting up the fact of his Protestantism; and they rely on *Edwards's case* (a) and *Regina v. Orgill* (b), as authorities for that contention. In *Edwards's case* the prisoner was indicted for marrying Anna Tunson in the lifetime of his first wife. The evidence was that, on the occasion of the second marriage, he signed the note for the publication of the banns, and the register of the marriage; and that in both the woman was named as Anna Tunson. Her father proved that his daughter's name was Susanna, and that he never knew her to be called Anna until he heard of her having been married to the prisoner by that name. The prisoner was convicted; but the Common Serjeant doubted whether the evidence proved the allegation in the indictment as to the second marriage to Anna Tunson: and whether the indictment should not have charged that the prisoner was married to Susanna Tunson by the name of Anna Tunson; and upon those doubts alone he reserved the case for the opinion of the Judges. The Judges held that the prisoner having signed the note for the publication of the banns of himself and Anna Tunson, and having signed the register of his marriage with her by that name of Anna Tunson, should not be permitted to defend himself on the ground that he did not marry Anna Tunson, although such might not be her name; and that therefore the conviction was right. The interpretation I put on the decision is that the acts of the prisoner furnished evidence as against him, that at the time of the marriage the woman was called or known by the name of Anna; and that would sustain the conviction, although, according to the evidence of the father, her right name was Susanna. If that be so, it is no authority for the proposition that the prisoner here, by reason of having represented himself as a Roman Catholic on the occasion of the second marriage, is precluded from relying on the fact found by the jury in answer to a question left to them by the Judge, without any objection on the part of the Crown, that he had, within twelve months before that marriage, professed himself to be a Protestant.

The case of *Regina v. Orgill* is more like the present case.

(a) R. & R. 283.

(b) 9 C. & P. 80.

There the second marriage was by a Roman Catholic priest in Ireland; and the prisoner represented himself to the priest who married him to be a Roman Catholic. Alderson, B., says:—"If at the time of the second marriage the prisoner declared himself to be a Roman Catholic, it is a good marriage as against him. The law on this subject was much considered by the Privy Council in the case of *Swift v. Swift*. If the prisoner, at the time of the marriage, held himself out to be a Roman Catholic, I am decidedly of opinion that he cannot now set up his Protestantism as a defence to this charge."

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In that case there was no Counsel for the prisoner. The attention of the learned Judge was not directed to the terms of the Act of 19 G. 2, which makes a profession of Protestantism within twelve months annul the marriage; and no evidence of the man having ever been a Protestant was given or offered. The only evidence was that he was married by a Roman Catholic priest, to whom he said that he was a Roman Catholic. The observation of the learned Judge, that he could not set up his Protestantism as a defence was entirely extra-judicial. But that observation is opposed to the decision of Chief Baron O'Grady in *Rex v. Hanly* (reported in the note to the case of *Regina v. Orgill*), in which he left the question to the jury; and it was disapproved of by MONAHAN, C. J., in giving the judgment of the Court of Common Pleas in *Re Darcys Minors* (a), and by CHRISTIAN, J., in his judgment in *Thelwall v. Yelverton* (b). I cannot therefore consider that dictum of Alderson, B., as an authority to be followed, even if it had any application to a case like the present, where evidence of the prisoner's Protestantism has been given, and a question as to it has been left to the jury, without objection, and found in his favour. The statement of the prisoner that he was a Roman Catholic at the time of the marriage, is no doubt evidence against him; but whatever might be its effect in a proceeding in the Ecclesiastical Court, between him and the wife, I do not see that it can be considered in a Criminal Court as precluding him from proving

(a) 11 Ir. Com. Law Rep. 298.

(b) 14 Ir. Com. Law Rep. 208.

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FITZGERALD, J.

It is with extreme reluctance that I have brought my mind to concur in the judgment of my Brother DEASY, and, I may add, also with the reasons he has given. My Brother O'HAGAN has stated in his judgment that his mind would revolt from such a conclusion ; and I confess that the state of the criminal law which coerces us to decide that so grave an offence against public morality may be perpetrated with impunity is very discreditable. However, such I conceive to be the state of the law, and we are bound to administer it.

HUGHES, B.

I am of opinion that the conviction cannot be maintained: The indictment on which the prisoner was arraigned and tried is in the ordinary form. It charged that on a certain day, and at a certain place named, he married one A B, spinster ; and her the said A B then and there had for his wife ; and that afterwards, and whilst he was so married to the said A B, to wit, on a certain day, and at a certain place named, he feloniously and unlawfully did marry and take to wife one C D, and to her, the said C D, was then and there married, the said A B, his former wife, being then alive. That indictment is in strict conformity with the statute against bigamy, and charges, in terms, that the offence was, entering into a second marriage, his first wife being alive. It was proved, upon the trial, that the second ceremony was performed under such circumstances that the law declared it to be null and void ; that is, that the prisoner never married C D, and that C D never was the prisoner's wife. The case must, therefore, be regarded as if the ceremony never had occurred ; and yet the crime with which the prisoner stands charged is joining in a ceremony which the law declares shall have no effect whatever.

For the reasons given by my Brother DEASY, I am of opinion that the conviction cannot be sustained.

FITZGERALD, B.

The prisoner was indicted for bigamy, under the Act 24 & 25 Vic., c. 100, s. 57. The first marriage was duly solemnized at St. Peter's church, Dublin, in the year 1858. The second marriage took place at the Roman Catholic church in Westland-row, Dublin, and was celebrated by a Roman Catholic clergyman in the year 1865.

By the Act 19 G. 2, c. 13, s. 1 (*Ir.*)—"Every marriage that shall be celebrated between a Papist and any person who hath been or hath professed him or herself to be a Protestant, at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." The jury in this case found that "the prisoner was a professing Protestant within twelve months prior to the time of the second marriage;" but they also found that "the prisoner had held himself out to the clergyman who married him" (*i. e.*, on the occasion of the second marriage), and that "he had stated to the woman" (*i. e.*, the second wife), "that he was a Roman Catholic."

By the direction of the learned Judges who tried the case, the jury found the prisoner guilty, and he was sentenced to be kept in penal servitude for five years, which sentence he is now undergoing. Upon the part of the prisoner, it is alleged that this conviction cannot be sustained; because the fact of professing Protestantism within twelve months before the second marriage, which has been found by the jury, rendered the second marriage a mere nullity; the consequence of which is said to be that the prisoner was not married a second time within the meaning of the statute under which he was convicted. There can be no doubt that the fact, that the prisoner was a professed Protestant within twelve months before the second marriage, would alone and of itself be sufficient to avoid that marriage absolutely; and there can be no doubt that the fact was established. If the *actual* truth of that fact was a material inquiry, the jury have found the actual truth of the fact.

The conviction has been supported in argument on two

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grounds:—first, that the question of the absolute invalidity of the second marriage, in a case in which a ceremony, apparently complete, of celebration of marriage has been proved, is immaterial, inasmuch as every such second marriage must necessarily be invalid: and as authorities for this position, the cases of *Rex. v. Penson* (a), which was decided by Mr. Baron Gurney in the year 1832, and of *Regina v. Brawn* (b), which was decided by Lord Denman in the year 1843, were relied on; and, secondly, that the prisoner's representations, as found by the jury, at all events precluded him from relying on the fact which would have avoided the second marriage: and as authority for that position, the case of *Regina v. Orgill* (c) and other cases were referred to. The former position, it was admitted, would apply only to the case of the second marriage charged in an indictment for bigamy; the latter position would appear to be applicable to the case of the first marriage charged in such an indictment also. The former position raises a question on the construction of the statute under which the prisoner was convicted; the latter raises a question on the law of evidence applied to criminal cases.

The words of the statute 24 & 25 *Vic.*, c. 190, s. 57, material to be considered are:—"Whosoever *being married* shall *marry* any other person during the life of the *former husband or wife*, whether the *second marriage* shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony." The question is as to the meaning of the words "shall marry." It is on both sides agreed that the previous words "*being married*" mean a marriage *de facto*, and cannot be satisfied by a marriage absolutely null and void, however perfectly celebrated as to ceremony. On the part of the prisoner it is contended, that the words "shall marry" are to be construed in the same way, and must mean a marriage *de facto*—a marriage which, considered by itself, would not be null and void. On the part of the Crown it is contended that, inasmuch as one "being married" cannot contract a valid marriage, the words "shall marry" cannot be construed to mean a

(a) 5 C. & P. 412.

(b) 1 C. & K. 144; S. C., Cox, C. C. 33.

(c) 9 C. & P. 80.

valid marriage; the thing to which they are applied must necessarily be a null and void marriage, and the words must be understood of form and not of substance.

By the Common Law, bigamy, or as it is more correctly called polygamy, does not appear to have been an offence cognizable by the Temporal Courts. In this country it was first made a felony by the statute 10 *Car.* 1, sess. 2, c. 21, corresponding with the English Act, 1 *Jac.* 1, c. 11, which first made it a felony in England. But, from the earliest period, polygamy was forbidden in both countries; and a second marriage contracted in the life of the former husband or wife was absolutely null and void. What is forbidden, in any case, can only be rightly understood by considering what the state of things would have been if the matter had not been forbidden. Polygamy is, the having at least two *lawful* wives or two *lawful* husbands; and when polygamy in the case of a husband is forbidden, what is forbidden is the having two lawful wives. If polygamy were allowed, polygamy would not exist in the case of two marriages, unless both marriages were valid according to the law of the country allowing polygamy. In the case of a husband, if one marriage were valid and the other void, the case would be a case of wife and concubine, not of two wives. Now, when polygamy is forbidden, the thing forbidden is not the having of a wife and concubine, but the having of two wives; which therefore, as it seems to me, must mean the having of what would be two lawful wives if polygamy were not forbidden. In forbidding polygamy, the law cannot be understood as forbidding a second void marriage, but as itself introducing a cause of invalidity which, but for that law, would not have existed at all. The law would be wholly unnecessary in the case of a second marriage, which was such in form only, but which independently of the law was a nullity. But this, though a most important consideration, is not necessarily decisive of the construction of a statute which makes a second marriage criminal in a country where polygamy was antecedently forbidden. It is a most important consideration, because, if the object of the legislator in the criminal statute was *only* to make criminal that polygamy which the antecedent law

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forbad, then the words by which the statute described the second marriage not only *may*, but *must* mean a marriage which would have been valid if polygamy had not been forbidden. It is not necessarily decisive, because in a country in which polygamy is forbidden, the legislator *may* deem it expedient to make criminal not only what is polygamy in its strictest sense, but also that which has an appearance of, or is an approach to it. But it clearly does show, as it appears to me, that the mere fact that the *second marriage* would, by the antecedent law, be void *as such*, would not prevent our construing the second marriage described in the criminal statute as a marriage which would have been valid but for the antecedent law. It shows, on the contrary that, in the absence of any evidence of the legislator's intention to do more than make that very thing criminal which was antecedently forbidden, this would be the natural construction of the criminal statute.

Now, this will be found directly to affect the reason of the decision in the case of *Regina v. Brawn*. To me, the language of the statute now in question seems, with great care, adapted to the case of polygamy in its strictest sense; the case, that is to say, of two marriages, each of which considered by itself, and without reference to the other, must be a valid marriage.

The very same words, "*being married*," "*shall marry*," are used to denote each marriage; the act which constitutes the felony is called "*the second marriage*;" and the relation arising from the first marriage is referred to as that of "*former husband or wife*," exactly as it would be on the supposition that both marriages were in all respects valid. Surely if the Legislature had a farther intention, some words would have been used to indicate such intention, "*apparent marriage*," "*ceremony of marriage*," or some language would have been employed from which it could be satisfactorily collected, what essentials of marriage the act which is made felony might want, other than that which is necessarily implied in the antecedent law which forbad and avoided it as a second marriage.

Up to this moment I have heard no satisfactory statement of

what the qualities of marriage are which the second marriage may want. I know that it must be a void marriage by reason of the former marriage; that is a necessary implication from the antecedent law; but what else it may want—for a marriage in some sense it must be—I can neither gather directly or by necessary implication from the statute. Now, considering that this second marriage is the act made felony, this, I confess, forces me to conclude that the second marriage must have all the elements of a valid marriage, except that which is necessarily excluded; that is to say, the particular capacity to contract arising from freedom from a prior subsisting marriage.

The 57th section of the 24 & 25 *Vic.*, c. 100, contains no recital from which any assistance can be drawn in its construction. It will be remembered, however, that it is part of a statute consolidating a number of enactments relating to various offences against the person. The same observation applies to the enactments for which it was immediately substituted—10 *G.* 4, c. 24, s. 26, which related to Ireland, and 9 *G.* 4, c. 31, s. 22, which related to England. Considering this, and considering how closely the language of the original statutes which made bigamy a felony has been followed in these consolidating Acts, it does not seem unreasonable to refer to the recitals of the mischief aimed at in the original statutes. The Irish statute was not passed till thirty years after the English statute: the recitals in each are substantially the same. I take that contained in the English as being somewhat shorter. The recital in the first section of 1 *Jac.*,^a c. 11, is:—
 “Forasmuch as divers evil disposed persons, *being married*, run out of one country into another, or into other places *where they are not known*, and there *become to be married*, having *another husband or wife* living, to the great dishonour of God and *utter undoing of divers honest men’s children, and others.*” Now the evil contemplated is evil arising from a *second* marriage: the dishonour of God plainly points to that very polygamy forbidden by the law of His Church; and though, doubtless, unless the second marriage were void, the other evils mentioned could not arise, yet, so far as those evils arise from *its mere nullity*, they would

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have equally followed from *any* void marriage. Is it not then plain that what the Legislature aimed at was evil arising from a marriage void only by reason of a former marriage; from a nullity which ignorance of the former marriage might possibly prevent parties from guarding against; and not from any nullity which must be guarded against in the case of *every* marriage. It was, I believe, truly observed by Mr. Wallace, in his argument in the *Duchess of Kingston's case* (a), that history gives no account of this Act or the immediate occasion of passing it; and that the journals of neither house furnish any lights on the subject. One might conjecture that the union of the two Crowns, and the influx into England of strangers from a country whose law of marriage was so different from its own as was that of Scotland, may have had something to do with the matter: but, be this as it may, the exceptions in the statute are not wholly immaterial.

Remembering that a Court of Law must hold every marriage *de facto* valid, though voidable, and that it exclusively belonged to the Court Christian to avoid such as were voidable only, it will be found that the exceptions are either cases of polygamy in the strict sense, or cases in which the inquiry into the existence of polygamy in that sense are precluded by the sentence of a competent Court. The exceptions are somewhat different in the later statutes, but the same observation applies to them. The language then of the statute before us, in describing the offence, is in its most natural sense applicable to polygamy properly so called; that is to say, the case of two marriages, each of which considered without reference to the other is valid, and the excepted cases are cases of the same kind. Unless coerced by authority, I am unable to resist the obvious conclusion from these considerations; that is to say, that the second marriage, which is felony, must be one which but for the subsistence of the first would have been a valid marriage.

Each of the decisions relied on by the Crown is the decision of a single Judge; and sitting here, I feel myself at liberty to consider, with deference, the reasons on which they rest. The earlier case is that of *Rex v. Penson*. There the second marriage took place in the

(a) 20 St. Tr. 514.

year 1832, when the prisoner married one Eliza Brown by the name of Eliza Thick. The second wife swore that she had never gone by or been known by the name of Thick, and had assumed it, when the banns were published, that her neighbours might not know she was the person intended. It was contended, on the part of the prisoner, that the misdescription rendered the second marriage void, and that consequently the crime had not been committed. Mr. Baron Gurney is reported to have said:—"That *applied only to the first marriage*; and I am of opinion that *parties* cannot be allowed to evade the punishment for an offence *by contracting a concertedly invalid marriage.*" Such is the whole of the judgment. The prisoner was convicted.

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I may observe that the case of *Rex v. Inhabitants of Tibshelf (a)*, referred to by the reporter in his note to *Rex v. Penson*, was a case under an Act of Parliament which was repealed at the time of the second marriage in the principal case. The Marriage Act then in force was the 4 G. 4, c. 76, on which it was held, in the case of *Rex v. Inhabitants of Wroxton (b)*, that, in order to invalidate a marriage for want of banns, it must have been contracted by *both* parties with a knowledge that no due publication of banns had taken place. This, no doubt, makes the learned Judge's observation as to concert very material, as it shows the marriage *could not* have been a valid one, and prevents any explanation of the case on the ground that it *might*, consistently with the Act, have been valid.

The case, therefore, appears to me to be a decision for the purpose for which it was cited; but it rests only on the authority of the Judge, for no reason is given. I venture to think there must have been some misapprehension of the nature of the crime, by the learned Judge, if by his last observation he meant to suggest that the enormity of bigamy, as bigamy, is enhanced when the second marriage is to the knowledge of both parties invalid.

I have called attention to some particulars of this case, because in the citation of some other cases upon the part of the Crown, during the argument, it did not seem to me sufficiently attended to, that where the marriage in question was under the 4 G. 4, c. 76,

(a) 1 B. & A. 190.

(b) 4 B. & A. 640.

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the undue publication of banns must, in order to avoid it, have been with the knowledge of both parties; and that, even under Lord Hardwicke's Act, supposed misdescriptions might be accounted for; and that statements of the prisoner would be always evidence against him of the truth of facts having a tendency to account for such misdescription; thus, that he had called a woman by a particular name, would be evidence against him that she was known by that name.

The other case is that of *Regina v. Brawn, or Bawn*. In that case the second marriage was with the husband of a deceased sister of the prisoner,—a species of marriage which the case of *Regina v. Chadwick (a)* decided to be absolutely null and void by force of the statute 5 & 6 W. 4, c. 54, s. 2; before which statute it would have been voidable only. Lord Denman (according to the report in *C. & K.*) said:—"I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy; otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify; for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay, by entering into marriage with another man." According to the other report in 1 Cox C. C.:—"Lord Denman had no doubt whatever that the second marriage was null and void under the Act mentioned; but that circumstance did not, in his opinion, affect the charge against the female prisoner. Her offence consisted, not in the contracting that which, but for the existence of her husband, would have been a legal marriage, but in her going through the ceremony of marriage, and appearing to contract that which was a legal and binding union at the time when she already had a husband living; that single fact constitutes the crime and the proof of it; and,

(a) 11 Q. B. 205.

"whether the union secondly contracted would or would not be null
 "and void if contracted under other circumstances *is a matter*
wholly immaterial to the inquiry. If it were otherwise in this
 "case, *the same argument would apply to all other cases; for if*
the second marriage be not null and void, the crime of bigamy
cannot be committed. I am, therefore, decidedly of opinion that
 "Jane Bawn committed bigamy by marrying Thomas Webbe,
 "though it was within the prohibited degrees of affinity."

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There seems to be no substantial difference between the reports; in both the only *reason* given for not holding the invalidity of the second marriage an answer to the charge is that, unless the second marriage were void, the crime of bigamy could not be committed at all. Now it is perfectly true that, unless the second marriage were null and void, the crime of bigamy could not be committed; but the act which is made felony must, notwithstanding, have *some* of the elements of a valid marriage; it is only described in the statute by the words "shall marry," and the question is, what right has the Judge to exclude any element of invalidity save that which is necessarily excluded by the provision itself? *Ex vi terminorum*, the second marriage *must* be a sufficient marriage to satisfy the description, notwithstanding the particular incapacity to contract arising from the former subsisting marriage; that element of invalidity, therefore, you *must* exclude; but whence is the authority derived of excluding any other? The objection to the second marriage is not simply that it is a valid marriage, but that it is void, and therefore not a marriage, by reason of an incapacity other than that arising from the former marriage; which latter incapacity is the only one necessarily or even apparently excluded from the marriage described as such by the statute.

I think I have already shown that, as a mere question of construction, the words of the statute, "shall marry," not only *may* "mean a marriage valid but for the existence of a former marriage, but that, having regard to the antecedent law, this is their natural meaning. It seems to me that such expressions as "doing all that in her lay," "appearing to contract *a legal and binding marriage*," are merely calculated to conceal the fallacy which appears to me to

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underlie the argument. They assume that the second marriage must have some essentials,—must exclude some combination of facts,—the want of which would prevent the act done from being a marriage within the meaning of the statute. In their vague generality they appear, and but appear, to allow some meaning to the words “shall *marry*,” but leave us wholly in the dark as to the means of discovering from the statute of what the supposed essentials consist. How are we to discover from the statute, when a prisoner has “done all that in him lay;” or what are the *appearances* “to contract a *legal and binding* union”? The statute says nothing of “appearing to contract a legal and binding union;” it says “shall marry:” and surely the only safe course is to say that means a marriage valid in *all respects*—a marriage having every element of validity save that which the *statute itself* shows *must* be excluded.

It may, at first view, seem easy to say that marriage has, according to law, two sorts of essentials; matters which are naturally or by the law of nature of its essence; and matters of ceremony which are rendered essential *only* by positive law: and that if a marriage be complete as to the matters of ceremony required, it will be the second marriage required by the statute. And this might be perfectly intelligible if in matters of ceremony are included *all* essentials which are required by positive law only. But then *cadit questio*, for the essential which the second marriage in the present case wants is one required by positive law only. And the moment you come to distinguish between matters of ceremony and matters not of ceremony, in the essentials required by positive law only, you are at sea again. Will it be said that matters of ceremony are such as the law makes essential with a view to publicity? It will be hard to say, then, upon what ground the essential in the case of *Rex v. Penson* was excluded. And, even if the matters of ceremony are still further limited to such as are required for the purpose of publicity at the very time when consent is given in words, then how are the cases of Scotch marriages to be dealt with, in which, so far as I know, none such are required? I might, perhaps, add the case of Roman Catholic marriages in this country, though indirectly it may be said the presence of a priest is made essential

by the decree of the Council of Trent ; but, can it be said that any *apparent* interchange of promises in Scotland will be a sufficient second marriage, without reference to the law of the country as to whether it would or would not amount to a valid marriage? But in truth these distinctions are purely arbitrary as to the matter in hand, and wholly unwarranted by anything to be found in the statute which is to be construed. Even if there were no authority on the other side, I should find myself unable to acquiesce in the two decisions cited on the part of the Crown ; but I do not think the case is wholly barren of authority on the other side.

Previous to the publication of the two decisions referred to, I can find no trace in any text-writer of an opinion that the law was as then laid down, not in *Sir Edward Coke*, not in *Sir Mathew Hale*, not in *Comyns*, in *Hawkins*, or in *East*. I do not find it, indeed, in terms stated, that each marriage considered in itself must be a valid marriage ; but except in the single matter of the competency of the second wife as witness, I can find no distinction made between the proofs requisite in the case of each marriage. *Sir Edward Coke* was Attorney-General when the Act of *James* was passed. In 3 *Inst.*, p. 88, commenting on the words "being married," he says :—"This extendeth to a marriage *de facto*, or "voydable by reason of a pre-contract, or of consanguinity, or of "affinity, or the like ; for it is a marriage in judgment of law untill "it be avoided ; and, *therefore*, though *neither* marriage be *de jure*, "yet they are within this statute." This seems to treat both marriages as in the same predicament as to proof. All that he says on the other words, "Doe at any time marry," is, "This *second marriage* is merely void, and yet it maketh the offender a felon." This, if it have any bearing on the question, would seem to indicate greater caution as requisite in the proof of the second marriage than of the first : and in truth, though it has been attempted to prove the first marriage by cohabitation and reputation, I am not aware that this was ever even attempted in the case of the second marriage.

If the proposition laid down in the case of *Regina v. Brawn* be law, it seems to be impossible to account for the number of cases in which the question of the validity of the second marriage has been

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discussed. Instances are the cases of *Rex v. Orgill* (a); *Drake's case* (b); *Regina v. Allison* (c), in which case the question was raised as to both marriages; *Regina v. Edwards* (d); *Graham's case* (e); *Regina v. Povey* (f); and there are others. In all these, if the law be as laid down in *Regina v. Brawn*, the question as to the validity of the second marriage was wholly immaterial, and yet this never seems to have occurred to any one. But I confess that the two last cases which I have mentioned appear to me to be express authorities on the very point; the case in *Dearsly* being also a late case, decided long since the case of *Regina v. Brawn*, and decided by the Court of Criminal Appeal. In the earlier of these cases, *Regina v. Graham*, the second alleged marriage took place in Scotland, and evidence was given of a marriage ceremony of some kind between the parties; a professional witness was called to prove the validity of the marriage according to the law of Scotland; he stated the law, and said, amongst other things, that the assent of both parties must be *very distinctly and clearly proved* in order to render the contract a valid one. Mr. Baron Alderson being of opinion that, upon the evidence, the assent of the second woman was not "distinctly and clearly proved," directed an acquittal. He acted on the evidence of the professional witness, and decided that there had been failure in proof of a necessary element of a valid marriage according to the law of Scotland. I may observe that, though not an absolute decision, another of the cases named by me, *Drake's case*, shows very clearly Mr. Baron Parke's opinion as to the necessity of establishing the validity of the second marriage. But the case of *Regina v. Povey* seems to me another express decision on the point. There the second marriage was also in Scotland; to prove it, a woman was called, who proved that she was present at a ceremony performed by a member of a congregation, but whether or not of the Kirk she did not know, in her own private house; that she herself had been married in the same way, and that parties in Scotland always married in private houses; and she proved cohabitation. It was objected that there was not sufficient

(a) 9 C. & P. 80.

(c) B. & R. 109.

(e) 2 Lewin, 97,

(b) 1 Lewin, 25.

(d) B. & R. 283.

(f) Dears. C. C. 32.

evidence of the validity of the second marriage according to the law of Scotland. The Common Serjeant, who tried the case, left it to the jury to find the prisoner guilty, if they would presume, from the facts proved, a marriage valid by the law of Scotland. The jury found the prisoner guilty. Jervis, C. J., says:—"The question reserved for the consideration of the Court is, whether the evidence given at the trial was sufficient to justify the finding of the jury; *and* whether some witness conversant with the law of Scotland should not have been called by the prosecutor, to say whether the facts given in evidence *constituted a valid marriage* according to the law of that country. . . . The Court *is clearly of opinion that some witness conversant with the law of Scotland should have been called on the part of the Crown*, with regard to the case before us. What the witness who was called *says, even supposing her a competent witness in the matter*, does not amount to any proof of *a marriage in fact*." This seems to me precisely in point.

On the whole, therefore, I think that the Counsel for the Crown have failed in establishing their first position—that the question of the validity of the second marriage in this case is immaterial.

The importance of the question, and the difference of opinion which exists, must be my excuse for the time I have occupied.

The second position of the Counsel for the Crown is, that the representation made by the prisoner, that he was a Roman Catholic, precluded him from relying on the fact which would invalidate the marriage. I assume this question to be sufficiently raised for our decision in the case before us, though I entertain grave doubts on this head. I think it clear that, with one exception, the admissions of a defendant in a criminal suit are evidence against him in the like way and manner as the admissions of a defendant in a civil suit. The exception arises from the necessity of showing in a criminal suit that the admission, when amounting to a confession of guilt, has been wholly voluntary. The ordinary use of admissions of a party is simply to establish the *actual truth* of the fact which is the subject of the admission. Their weight for this purpose varies much in different cases and circumstances, and when simply used

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for this purpose, they never are conclusive. It may, notwithstanding, be shown that the fact admitted is not actually true. No doubt, however, in some cases effect *in the nature* of estoppel is given to admissions and representations, and also to acts amounting to admissions or representations of a party to a suit. But then, as in other cases of estoppel, the admissions, representations and acts are not simply used—perhaps cannot be said to be properly used—as evidence of the *actual truth* of the fact, but as rendering the *actual truth* of the fact immaterial. In the case before us there can be no doubt that the prisoner's representations were evidence against him of the actual truth of the fact that he was a Roman Catholic. But it is plain that, in substance, the use sought to be made of them is, to render immaterial the inquiry, not the actual truth of that fact; for if it could be inquired into, he must assume that the fact is not actually true. Now I am not aware that an effect of this nature can ever be given to admissions, representations, or acts, except upon questions of the fact which is their subject, arising between the party whose admissions, representations, or acts they are, and some party who is either proved to have, or may be fairly considered as having, acted on the faith of the representations, admissions, or acts. It is impossible to apply this to a case between the Crown and the defendant, who are the parties in controversy here, considering what the subject of the representation was.

If the case of *The Queen v. Orgill* (a) decided to the contrary, I can only say, with deference, that I cannot acquiesce in that decision. It would be applying to criminal cases a rule not applicable to civil. Admissions, representations, or acts may render further inquiry as to the actual truth of the fact, which is the subject, immaterial *as between particular parties*, but not absolutely. But I confess I am not satisfied that the case of *The Queen v. Orgill* is at all a decision to the contrary. I apprehend that when in an indictment for bigamy the prosecutor shows any fact which would render either marriage absolutely void, unless there were the concurrence of some other fact, he must proceed to give evidence of that other fact, or fail. Thus, under Lord Hardwicke's Act,

(a) 9 C. & P. 80.

a marriage by license, when either party was an infant, was absolutely void, if made without the consent of the parents or guardian; and if either party appeared in the prosecutor's case to be an infant, it was necessary to prove consent: *Regina v. Butler* (a); and an objection that there was no evidence of consent would prevail

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Now, as all Irish marriages by a Roman Catholic priest are void, except those solemnized between persons of his own religion, it may well be that if the prosecutor shows a marriage to be solemnized by a Roman Catholic priest, he must proceed to show that the persons married were both Roman Catholics; and if he does not, an objection to that effect must succeed. But the prisoner would be precluded from making that objection if it was shown that he had admitted himself to be a Roman Catholic, because that would be evidence of the fact. So far as I can see, this *is* all that was determined in the case of *The Queen v. Orgill*, and not that the prisoner was precluded from showing, by substantial evidence, that he was a Protestant. There may be some ambiguity in the language used by Mr. Baron Alderson, but this seems to be the fair account of the case, looking at the whole report.

On the whole, I am of opinion that the Counsel of the Crown have failed in establishing either of the positions relied on by them, and that the conviction is erroneous.

O'BRIEN, J.

I concur in the opinion expressed by my four Brethren who have immediately preceded me, that the conviction before us is erroneous, and should be reversed. The second marriage of the prisoner, having been celebrated by a Roman Catholic clergyman, would admittedly have been of itself null and void, even if the prisoner had not been previously married. And it is equally clear that, if his first marriage had been void for a similar reason (as having been celebrated by a Roman Catholic clergyman), then that the second marriage, however duly and legally solemnized, would not have constituted the crime of bigamy as defined by the statute 24 & 25 Vic., c. 100, s. 57, under which the prisoner has been convicted.

(a) R. & R. 61.

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The case now before us is the converse of that which I have supposed. And the question is, whether the illegality which is inherent in the prisoner's second marriage (independent of any previous marriage) does not equally exonerate the prisoner from the charge of bigamy. Prisoner's Counsel contend that, in order to establish that crime, it is necessary, not merely that the *first* marriage should have been duly celebrated according to law, but that the second marriage also should be one which, but for the previous marriage, would have been legally valid. It appears to me that this is the true construction to be put upon the statute; and that it is in accordance with the observations of Chief Justice Tindal, when delivering the unanimous opinion of the Judges in the case of *The Queen v. Millis* (a), in the House of Lords. The indictment in that case was upon the Irish statute then in force against bigamy (10 G. 4, c. 34, s. 26), under the provisions of which, every person is guilty of the offence "*who, being married before, shall marry any other person during the life of the former husband or wife.*" These words are exactly similar to the definition of bigamy in the present statute. And with reference to those words Chief Justice Tindal says [p. 688]:—"Now the words '*being married,*' in the first clause, and the words '*marry any other person,*' in the second, 'must of necessity point at and denote marriage of the same kind 'and obligation.'" It is true that the question in *The Queen v. Millis* was as to the validity of the prisoner's *first* marriage, and as to the effect which its invalidity would have upon the charge of bigamy; but the passage I have quoted from Chief Justice Tindal's judgment, and his application to the case before him of the rule which he so laid down, would show (as appears to me) that, in the opinion of the Judges, the offence of bigamy would not be made out if the second marriage was one that would of itself have been invalid even if there had been no previous marriage. The rule laid down by Chief Justice Tindal was not dissented from by any of the Law Lords who delivered judgment (of whom Lord Denman was one), although Lord Lyndhurst [p. 780] refers to the conclusion which Chief Justice Tindal deduced from it. Independent of the

(a) 10 Cl. & F. 688.

authority of that opinion, I think, for the reasons stated by some of my Brethren who have preceded me, that, notwithstanding the decisions in *The King v. Penson*, *The Queen v. Brawn*, and the other cases relied on by the Crown, the construction we should put upon the statute is that which has been contended for by the prisoner's Counsel. Those reasons have been already so fully stated that it is unnecessary for me to repeat them.

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I concur also in the regret which has been expressed, that the state of the law should be such as to relieve the prisoner from punishment for his fraudulent and scandalous conduct, the moral guilt of which is not the less because it does not bring him within the penalties of the law; but, being of opinion that the construction I have mentioned is that which should be put upon the statute, I do not feel myself at liberty to adopt a different one in order to prevent results which, however injurious and deplorable, should more properly be obviated by legislation.

CHRISTIAN, J.*

I am also of opinion that this conviction ought not to be sustained. The case depends upon one single question, and that is, in what sense the verb "to marry" is used in two places in which it occurs in the definition of bigamy, as given by the 24 & 25 Vic., c. 100, s. 57? That is the question. It occurs to me that we have nothing to do with the criticisms upon the difference between the meaning of the words "bigamy" and "polygamy," or with what meaning the term "bigamy" may have borne at an early period in our law. This Act of Parliament (the 24 & 25 Vic., c. 100, s. 57), has defined the offence, and has correctly or incorrectly called it "bigamy." Now, as to the sense in which the word "marry" is made use of in the first branch of the definition—that is to say, "whosoever being married,"—there is no controversy; all are agreed that, as used there, it means nothing else than a perfect, complete, legal solemnization; and it is

* This is the Reporter's note of Mr. Justice CHRISTIAN's judgment. It has not been corrected by the learned Judge, and the Reporter is alone responsible for its accuracy.—J. L. W.

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furthermore admitted that such expressions as those attributed to Lord Denman, in *Brawn's case*, have no application at all to the first marriage in this case. Moreover, it is admitted by the Counsel for the Crown that if the circumstances which affected the second marriage in this case had affected the first, the first branch of the definition "being married" would not be fulfilled, and that this prosecution must fail. Therefore we start with this, that "being married," in the first branch of the definition of bigamy, means united by a ceremony perfect in all points; and the ceremony we are dealing with here admittedly does not answer that description. Well then, what is next to be considered? It is, what does the same word "marry" mean, used in the next branch of the very same sentence?—what is its meaning in "shall marry any other person"? Well, *prima facie*, one would say the word in both branches of the sentence must mean the same thing. *Prima facie* one would say that any defect in the ceremony which would incapacitate it from constituting the state of being married under the first branch of the definition, would equally prevent it from being a marriage within the second. That seems to me tolerably clear. However, it is said that that is not so, and that there is a vital difference between the meaning of the word as used in the two branches. As I understand the argument, I take it to be this—by necessity the definition of the second ceremony must mean a ceremony which, no matter how perfect, must fail of effect. It cannot make the woman a wife; it cannot constitute a marriage: and then it is said that, being thus inherently void, it follows that all nullifying enactments, of whatever sort or kind they may be, whether as regards the publication of banns, or the prohibited degrees, or such an act as we are dealing with in the present case, that everything of this kind is a mere *brutum fulmen* as applied to the second ceremony, because you cannot nullify a nullity. Now that is the argument, if I understand it at all. Well, I confess, to my apprehension, this is not conclusive reasoning. No doubt the definition given by the statute involves in it this—that the nullity of the second marriage, by reason of the existence of the first, will not prevent the second marriage from constituting a case

of bigamy. How does that warrant our dispensing with any other statutable or legal requirement to the marriage, where the language the statute has made use of, the word "marry" involves them all, and where there is not in the second case, any more than in the first, any words in the statute indicating that any legal requirement could be dispensed with? How does it follow that because the Legislature, from the very necessity of the case, has dispensed with one requisite for the validity of the second marriage, that it has therefore dispensed with every other legal requisite of marriage, although every one of them is pointed at and included in the word "marry," which is made use of; and there is not a particle, either of expression or implication, intimating an intention to dispense with any one of them? If you yield to the argument of the Crown in this instance, how can you stop short of what was pointed out by my Brother FITZGERALD early in the argument of this case, namely, that you may strip off, one by one, every statutable requirement—every law by which the State has fenced round this institution of marriage, until you come down to what we may call the primary element of marriage—the bare *consensus*—and then two people meeting in a room, and saying, "let us from this time forward consider ourselves as husband and wife," will, if there happens to be a previous marriage, constitute the guilt of bigamy? I confess it appears to me, that the essence of the crime this act constitutes is this—the abusing of a legal ceremony of marriage—that ceremony which the law has ordained for matrimony,—by using it while a previous use of it is still in force. I think the crime consists in the abuse of a legal ceremony, and therefore that if the ceremony used be not a legal one, whatever other offence has been committed, the crime of bigamy, as defined by this statute, is not committed. When once the legal ceremony is completed, if there be nothing which prevents that legal ceremony from constituting a valid matrimony but the fact of the previous marriage, then in my opinion it is committed. And I cannot, for my part, understand how, if the Legislature had intended anything else than that it would have used only these simple words, "shall marry another person," and not have introduced such words as my Brother FITZGERALD adverted to, "shall pretend to marry another person,"

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or something to that effect. This would be my opinion upon the mere construction of the Act of Parliament itself, supposing the question was entirely a new one; but a difficulty is raised by the cases. Now, the case that seems nearest to the present one, beyond all question, is *The Queen v. Orgill*. *Orgill's case* was decided on the very statute we are dealing with here; it is the case which was relied on by the Crown at the trial; and it is the case which is absolutely and directly in point with the case now before this Court, but for the express finding of the jury in this case of the profession of Protestantism within twelve months. I say in point, because there is no substantial difference between the representations of the prisoner here to the priest and to the woman, and those of the prisoner in *Orgill's case*. If there be anything clear, it is, in my opinion, that in degree and in kind the representations in both cases are absolutely the same. Well then, how is *Orgill's case* to be disposed of? It is now subjected to a review which, perhaps, may be considered, having regard to the constitution of the Court, more authoritative than any it has yet been subjected to. How then, if it be in point, is this case to be met? In my opinion it is removed from all application to the present case, by the express finding we have of the jury as to the profession of Protestantism by the prisoner within twelve months before the marriage. Assume *Orgill's case* to be rightly ruled by estoppel, the man must be taken to be a Roman Catholic within the twelve months before the ceremony; but here there is a finding that the prisoner was a Protestant within the twelve months; and then, as regards the violation of the statute, *cadit questio*. But I do not wish to rest upon that. I confess I cannot assent to *Orgill's case* at all; and it appears to me that Baron Alderson, when he rested his decision in that case on the ground of estoppel, was not aware of the nature of the Irish Act he was dealing with, and that probably with the history and the text of that Act he was unacquainted. I must say that I adhere, after full consideration, to what I had occasion to throw out but incidentally in the case of *Thelwall v. Yelverton*; and I think we would be taking an extremely inadequate view of this Act of Parliament if we regarded it in the same light with the other Acts

of Parliament which the English Judges had to deal with in the cases referred to—Acts of Parliament merely regulating what I may call marriage procedure, in relation to banns, prohibitory degrees, and matters of that description. When we are pressed with this authority, I think it is incumbent upon us to look a little into the origin and policy of the statute. Well, what was it in its origin? At the time it was passed it was part of a great political code, enacted for the purpose of carrying out a great state policy of the period; and, although that policy has been since condemned, and although that code itself has been swept away, yet the Legislature has thought proper, when repealing that code—for what reason I know not, whether wisely or unwisely it is no province of mine to consider—deliberately to retain this Act of Parliament. Well, I am of opinion that, sitting here as we are, not as legislators or moralists, but sitting as Common Law Judges, it is our duty, when we are called on to override a statute of this kind by the estoppel of an individual, to consider what its object and its policy were. Now, as to the policy. The policy of the Acts, of which this was but one at the time when they were passed, was to check any interference in the least degree by a Roman Catholic priest with the marriage of a Protestant; and, although that has been so far altered that the priest cannot now be punished, I feel myself constrained to hold, from the fact of the Legislature having deliberately thought proper, when repealing the rest of the code, to retain this statute, that the action of a Roman Catholic priest, by the marriage of a Protestant, shall be worthless for all purposes whatever, either civil or criminal—shall be in fact as a thing which never had existence. Well, then, what is the consequence of that? A question of public policy is at once introduced; and no matter what you may think of that policy—no matter how you may condemn it—no matter how much you think it obsolete and an anachronism—I am of opinion that, sitting here in a Court of Law, you cannot allow that statute to be rendered inoperative by the personal estoppel of an individual; and that it is impossible to say that estoppel or evidence created against himself can prevent a prisoner from bringing under the notice of the Court that that

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with which he is charged is the very thing which this Act of public policy has prohibited and declared shall be null and void—as void for creating bigamy as for creating matrimony. My opinion is that, when once it is proved that the prisoner was a Protestant—a Protestant in the sense which I endeavoured to explain in *Thelwall v. Yelverton*—shown by proof of direct outward act; and that, for any purpose whatever, he made certain false statements to certain individuals, these statements are absolutely without any value whatever; and I think the jury ought to be told so, and to pay no regard whatever to them. If those statements of the prisoner had never been made, the difficulty in this case would exist precisely as it does exist. That is the question which is raised by *Brawn's case*, and the other cases which have been referred to. Passing then from *Orgill's case*, I will say a few words on the other cases. As to *Brawn's case*, I confess I am disposed to attach somewhat more weight than appears to be done by the other Members of the Court to the distinction pointed out between that case and the case before us. In *Brawn's case* the ceremony was complete—perfect in everything which the law required; and the only thing which prevented it being a valid marriage was the circumstance that the parties were within the prohibited degrees; but in the case before us the defect is in the ceremony: there is no ceremony at all; or there is worse than no ceremony, because there is that which is condemned to nullity by a law of public policy. In *Brawn's case* the ceremony was perfect; in this case there is, as I said, no ceremony at all; and I can quite understand that a distinction may be taken, that in *Brawn's case* a complete legal ceremony had been performed; that a state of marrying in that case, within the definition of bigamy in the Act of Parliament, had been completed, and the offence so constituted; although by reason of some disability personal to the party, valid matrimony did not follow. But, where something prohibited by law forms part of the ceremony, then the state of marrying within the meaning of the Act of Parliament has not been perfected. If there be that distinction, *Brawn's case* would be strictly right; and the very language of Lord Denman, who says that it is the ceremony which constitutes the crime of bigamy, would be strictly

right; and so also, in the case suggested by my Brother HUGHES, E. T. 1866. that of a double bigamy. If it were shown that at the time of the second marriage both parties were already married—the husband had a former wife living, and the wife a former husband living,—could the man defend himself from a prosecution for bigamy on the ground that the second marriage was void by reason of his previous marriage and his wife's,—can he defend himself by pleading that his wife was as guilty as himself; in other words, is neither of them to be held guilty because both are guilty? Well, I confess I see no way out of it, unless it be in the distinction I have been suggesting. However, I see nothing in this matter as affecting the present case. The case suggested will meet its solution whenever it arises. I merely say that, probably a distinction may be taken in a case where the ceremony is complete, although it fails of its legitimate effect by reason of some personal disability of the party. Upon that, however, I express no opinion. I only express my opinion on the case before us, that where the Legislature has thought proper to say, upon grounds of public policy, rightly or wrongly, that the second marriage shall be null and void, to all intents and purposes whatsoever, we are bound to hold that it is so, and that it is as impotent to create crime as it is to confer civil rights. With respect to the other cases, *Penson's case* and *Edwards's case*, the distinction I have suggested certainly is not applicable to them. There the defect appears in relation to the ceremony—in the publication of banns; unless you refine so much as to say that banns are not part of the ceremony, but preliminary to the ceremony. But unless these cases are distinguishable from the present case upon the broad distinction between the statutes in England dealing with matters of marriage procedure and the statute here, which is one of public policy, I do not see how, fairly, the cases can be distinguished. But, sitting in this Court, I hold myself not bound by them if I cannot approve of them; and accordingly, for the reasons that have been mentioned already by my Brother FITZGERALD, and which I shall not repeat, I cannot concur in those authorities; and I decline to follow them.

With respect to the cases cited on behalf of the the prisoner,

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I say no more than this, that the opinion of Chief Justice Tindal, in *The Queen v. Millis* (a), is strongly in favour of the prisoner; that that opinion is approved of by Lord Lyndhurst in the same case (b), and that it receives further countenance in the case of *Burt v. Burt* (c), already referred to. However, I do not place any great reliance on that case, having regard to the broad distinction between the purview of the two statutes under which *Burt v. Burt* was decided, and the present prosecution has been brought forward—the one a statute for divorce, the other a statute for the punishment of crime.

In the reasons I have given—and, I must say, still more for the reasons that have been assigned in the judgment of Baron FITZGERALD, I am of opinion that this conviction cannot be sustained. I should regret deeply the decision which will be pronounced to-day, if I did not feel convinced that the Act of Parliament in question will not long survive that decision. It will now, for the first time, be clearly declared, as the opinion of the first Court of Criminal Jurisdiction in this country, that this Act of Parliament is in the statute book, capable of being resorted to by the profligate and the base with perfect impunity, as a means of fraudulent seduction. And, when the case is brought to that, I trust I may hope that there will be no longer delay than is absolutely necessary for the course of legislation between the decision of this Court and the repeal of the Act of Parliament in question. One word more, as to the observation to the effect that the priest is no longer punishable: I meant by that, that the statutes *in pari materia* with the Act of Parliament making the offence a felony have been repealed. I did not advert, nor did I intend to make any observation with respect to the last Irish Marriage Act, which, by a general enactment, not specially applicable to Roman Catholic priests at all, makes the celebration of an illegal marriage punishable.

KEOGH, J.

I am of opinion, with my Brother O'HAGAN, that this conviction ought to be upheld. It is scarcely necessary for me to say that I

(a) 10 Cl. & F. 688.

(b) *Ibid*, 870.

(c) 2 Sw. & Tr. 88.

must have considerable doubt as to that opinion, knowing that a majority of this Court have already made up their minds to reverse the conviction. However, I take the same view now that I did at the trial when the case was before me. The difficulty I feel, and the ambiguity which exists as regards this question, arises, in my opinion, from taking a somewhat contracted view of the question. I think too it in a great measure arises from our being disposed to run these statutes into one another, without asking what was the purview and object of the Legislature when each of those statutes was passed. The first Act to which I shall refer is that which has been called the statute against bigamy—the Act of *Charles*. The words of that statute, repealed as it is, have been carried down through a number of other statutes, until we come to that on which the present indictment is framed, namely, the 24 & 25 *Vic.*, c. 101, s. 57. But the original Act of *Charles* is not, I think, without bearing upon this question. Now what are the words of that Act? It recites that:—"Inasmuch as divers evil-disposed persons, being "married, run out of other of his Majesty's realms or dominions "into the realm of Ireland, or into other places where they are not "known, and there become to be married, having another husband "or wife living, to the great dishonour of God, and the utter "undoing of divers honest men's children, and others." And then it enacts:—"That if any person or persons, being married, or "which shall hereafter marry, do marry any other person or persons, the former husband or wife being living, every such offence "shall be felony, and the offender suffer death." Now, what is the great evil that is spoken of by that statute? It is the "becoming to be married" by persons having "another husband or wife living," to "the great dishonour of God, and utter undoing of divers honest men's children, and others." Well, how was that evil effected? It was not by the contracting of a lawful or a legal marriage a second time, because there could be no such thing as a valid second marriage; that was perfectly impossible. The first marriage having taken place and being subsisting, a valid second marriage there could not be. Therefore the evil to society, the crime against the

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honour of God, and which led to the utter undoing of honest men's children, and others, was being accomplished by a thing which under no circumstances could be a valid marriage. It was to be accomplished by the pretence of a marriage—by the going through a ceremony of marriage which never was to be valid, but was at all times to be invalid; and it was by that the injury to society was, I repeat, to be accomplished, and the dishonour to God to be effected. These were the evils which I think the whole of these bigamy statutes, from the time of *Car. 1* to *Victoria*, meant to provide against. Well, let us suppose that, at the time of the passing of the Act of *Charles*, a prisoner was indicted, as this man Fanning has been indicted, and the same identical evidence was given against him as in this case, there cannot be a shadow of doubt that he would be properly convicted. Well, between the time of the passing of the Act of *Car. 1* down to the 19 *G. 2*, c. 13, there can be no doubt of the perfect validity of the conviction. Can, then, under the very same state of facts, a person be validly convicted in Ireland for a marriage effected in the same identical manner? Let me suppose this man Fanning was in Dublin validly married by a Protestant clergyman to a Protestant woman, and that subsequently he went to France, and got himself married there by a Roman Catholic priest to a Catholic woman, he being a Protestant, can there be a shadow of doubt that he could be indicted here in the city of Dublin, on the very same state of facts, and found guilty of bigamy, notwithstanding the Act of 19 *G. 2*? And why? Because the 24 & 25 *Vic.*, c. 100, expressly uses the words "whether the said second marriage shall take place in England, Ireland, or elsewhere:" and does any one venture to say that it would not be a perfectly valid marriage contracted under the circumstances that have been proved in this case, only changing the venue, and taking the marriage to be performed in Paris instead of Dublin? Now, that being the scope and intention of the Act against bigamy, we come to the Act of 19 *G. 2*. The Act I have been referring to is an Act for the preservation of good order in society; for the preservation of the children of divers honest men, and others—the object in fact which pervades the whole of these

Acts against bigamy; and it gives that protection by making the party guilty of felony who goes through what is merely a ceremony of marriage, but which can never constitute a valid marriage. Well, what does this Act of 19 G. 2, c. 13, do? Has it anything to do—does it purport to have anything to do with the general interests of society? I take leave to say that the Act of Car. 1 is a statute wisely and properly providing for the general safety and security of society. But is that the object of the 19 G. 2, c. 13?—is it the object of those other Acts of which this is one—so properly described by my Brother CHRISTIAN as political Acts of Parliament? The 19 G. 2, c. 13, recites that the law in force to prevent Popish priests from celebrating marriages between Protestants and Papists being ineffectual, and enacts that after the passing of the Act, marriages by a priest between Papists and Protestants, or parties professing Protestantism within twelve months of the marriage, shall be null and void to all intents and purposes. What is the object provided for by that Act of Parliament? Has it anything at all to do with bigamy? The object of it was to prevent marriages by Popish priests, between Papists and Protestants. What marriage was it to prevent? The first marriage, or the second marriage, any marriages which but for the Act would be good—marriages which interfered and conflicted with the political views of the persons who wanted to establish Protestantism in this country, and utterly root out what they called “Popery:” but the Legislature, in passing this Act, never dreamt of affecting the statutes against bigamy. Their object was merely to prevent valid marriages between Protestants and Papists. If they did intermarry, that marriage was to be of no effect to establish that relation which would otherwise naturally exist between these parties. But the statute was never intended to apply to such a case as this we are now discussing. Why? There could not be a shadow of doubt at all that the second marriage was bad: and, if the second marriage took place between a Roman Catholic and a Protestant, no matter how it took place—whether by a Protestant clergyman or a Catholic priest—it was equally invalid. Therefore it seems to me that, looking into the scope and object of

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Reserved. legitimate effect without controlling the one by the other; and then
THE QUEEN I come to question of authority. Now, it is said that we have no
v. authority here absolutely controlling our decision, and also (and in
FANNING. this I concur) that we are are entitled to review the decision of
independent Judges; and, if we cannot run with them, we of course
must express our opinion against them. But, when I consider what
is the question before this tribunal, and when I remember who Lord
Denman was, and what a Judge he was, and how the character of
his mind was adapted to the consideration of questions of this
enlarged nature, I cannot lightly pass away from his decision. I
ask myself, first, is there any way of distinguishing this case from
The Queen v. Brawn? Not one of my Brethren who preceded
me, except my Brother CHRISTIAN, has even tried to distinguish
the two cases—not one. My Brother FITZGERALD has, I think,
admitted the identity of these two cases. If *The Queen v.*
Brawn was a decision governing this Court, we should hold, with
Lord Denman, that the conviction here was good. But can the
case of *The Queen v. Brawn* be distinguished from the present
case? My Brother CHRISTIAN ingeniously suggests that here
there is a question of ceremony; whereas in *Brawn's case* it was
a question of personal disability. But how is this marriage bad,
for the purposes of conviction, by reason of a defect in the cere-
mony? Supposing we are to be governed, in the consideration
of the whole question, by the effect of the two statutes involved,
what have we? The statute here makes the marriage invalid by
declaring that a particular thing being wanting, or the ceremony
being performed in a particular way, or by reason of the particular
person married, the ceremony shall be null and void to all intents
and purposes. Well, *Brawn's case* is governed by exactly the same
principle. There the disability arose from a statute which expressly
provides that all marriages after the 31st of August 1835, celebrated
between persons within the prohibited degrees of consanguinity,
shall be absolutely null and void to all intents and purposes. In
this statute of 19 G. 2, which is to govern the case before us, there

is not one word, as to the nullity of the marriage, that is not also in the statute 5 & 6 W. 4, brought under the notice of Lord Denman in *Brawn's case*, and which there rendered the marriage null and void to all intents and purposes whatsoever. Well, in *The Queen v. Penson* the objection was to a matter of ceremony, it arose on the invalidity of the publication of the banns; yet the conviction was held good, as in *The Queen v. Brawn*. The question raised here was distinctly brought under the notice of Lord Denman; and what does he say? "I am of opinion that the validity of the second marriage does not affect the question; it is the appearing to contract the second marriage, and the going through the ceremony, which constitutes the crime of bigamy; otherwise it could never exist in an ordinary case, as the previous marriage always renders null and void the marriage celebrated afterwards by either of the parties in the lifetime of the other." There cannot be clearer or more coercive language than that made use of by Lord Denman in *The Queen v. Brawn*. His decision was made twenty-four years ago (in 1843); and it has not since been questioned. I think that decision proceeds on a true and just reading of the whole of these statutes; and I think that the mistake of those whose opinion leans to the other side arises from an idea that the word "marry," in relation to the second marriage, used in the statutes against bigamy, involves that the second marriage must be identical with the first; whereas that is an utter impossibility. The second must be always null if the first is good; and then we must conclude that what was in the mind of the Legislature was, that the party should be guilty of felony who went through the form or ceremony, so far as he was concerned, constituting a marriage, but which differed from the first marriage in this, that while it was a real marriage the second was a sham.

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PICOT, C. B.

I concur in the judgments pronounced by my Brothers O'HAGAN and KEOGH. I shall not attempt to add to their arguments. Any endeavour to strengthen would only tend to damage that perfect

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chain of reasoning with which the discussion on the Bench was commenced by my Brother O'HAGAN. I shall only say a few sentences on one portion of the case. That any Judge dissenting from a majority of the Court, in such a case as this, should express an opinion otherwise than in doubt and hesitation, would be not only presumptuous, but most unreasonable. I certainly consider the case one of very great difficulty; and I have no hesitation in saying that one of the greatest difficulties I have had to encounter was the topic which was presented with such force and clearness by my Brother Baron FITZGERALD—that of the infirmity of the ceremony; it being prohibited by law that a Roman Catholic priest could solemnize a marriage under a condition of things against which the statute 19 G. 2 was aimed. I, however, relieve myself from that difficulty by the consideration that after all it is only removing a stage further what is in truth and fact a disability of the party. The disability of the priest results from the disability of the party. The prohibition to the priest to marry a professing Protestant—one who professed Protestantism within a specified time—to a Roman Catholic, arises out of the *status* and condition of one of the parties: the priest might perform what would otherwise be a valid ceremony, in entire ignorance that the ceremony which he is performing is not perfectly valid and good. In truth, therefore, the infirmity of the ceremony arises out of the *status* of the parties, and is not in substance and in fact a matter that arises from the mere act of the priest. That is all I think it necessary to say on that subject.

With respect to the authorities that have been cited, I wish to add a few words. As to *Drake's case*, it appears to me not to have been decided upon grounds which can render it an authority against the opinion I am now upholding. I do not take that case to have been decided on the ground of an invalidity in the marriage that was then under consideration. I take the decision to be distinctly and specially applied to that which was so familiar, particularly before the statutes of amendment, to all who were conversant with the Criminal Law, namely, that the crime as alleged was not the crime as proved. The charge was, that the prisoner had married

a woman bearing a specified name; the proof was, that the prisoner married a woman who did not bear that name, and who bore another name. Mr. Justice Parke, in dealing with the question of variance, had of necessity to consider whether the defence was or was not material; and he adverts to the manner in which the name was used in the publication of banns (under the Marriage Act in England), for the purpose of proving the materiality of the name. Therefore I consider that decision to be nothing more nor less than this—that the proof did not sustain the allegation: and it did not sustain the allegation because it failed by a variance in a material particular; that variance being material, because it affected the procedure of the ceremony as required by the Act of Parliament. That appeared to be the decision in *Drake's case*. With respect to *Graham's case*, *The King v. Povey*, and *Burt v. Burt*, they all appear to me to have been decided upon one and the same ground, that there was defective proof—of what? Defective proof of the ceremony; the passing through which, according to the view that governed Lord Denman's decision, in *The Queen v. Brawn (a)*, was the essential attribute of the crime of bigamy. In each there was defective proof of that second marriage, which in each case was alleged. We are all pretty familiar with the Scotch law upon the subject of marriage, after the discussions that took place in the *Mountgarrett case* and in *Thelwall v. Yelverton*. According to Scotch law, where the words of the contract are by parol, it must appear clear to the tribunal that is to determine on the validity of the marriage, that there was complete consent. In one case, from a defect in that proof, the Court held that the marriage ceremony was not proved according to the law of Scotland. Well now, as to *Burt v. Burt (b)*, I do not think it can be treated as a decision on the point now in controversy. In that case a divorce was sought, on two grounds, under the Act of Parliament: one an alleged bigamy; the other adultery, accompanied by desertion; the party claiming the divorce being a woman, and the desertion being proved. What

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(a) 1 C. & K. 144; S. C., 1 Cox, C. C. 33.

(b) 2 Sw. & Tr. 88.

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the Court say (no argument is reported, no reasons are offered, no authorities cited, no such question raised as that now before us) is this:—"We cannot in this case consider the bigamy as proved. "There must be proof of such a ceremony as but for the former "marriage would have constituted a valid marriage. In the absence of formal proof of the law of Australia, we cannot say this "is the case" And then they go on to give their judgment; which proves that the previous matter was not necessary to be considered with any care or fullness, and which indeed would rather indicate that the previous matter was an extrajudicial opinion upon the case; for they expressly rest their judgment on another ground:—"But "without putting our decree on the ground of bigamy"—that is, in other words, declining to decide the question raised on that ground,—“we think that Burt's cohabitation with the woman with "whom he went through the ceremony, and his desertion of his wife, "are sufficiently established to warrant a decree of dissolution (a)."

The absence of the proof of the ceremony, on the existence of which *The Queen v. Brawn* was decided, prevailed in *Burt v. Burt*; and in that view it appears to me that *Burt v. Burt* does not conflict with *The Queen v. Brawn*.

Further, it seems to me that the Act of Parliament on which *Burt v. Burt* was decided is not to be treated as one which we can at all deal with as *in pari materia* with the criminal statute, on which we are to determine what is that which, being inconsistent with a previous marriage, constitutes the crime of bigamy, and not what is that which is sufficient to warrant a divorce for bigamy. The Act of Parliament with which we have to deal must be considered in a different view; and I think it has been rightly considered by my Brothers O'HAGAN and KEOGH. There is one topic which has been very much urged, and which I wish to be considered as not expressing any definite opinion upon. I mean the contention, that the prisoner was precluded by his own act, at the time of the solemnization of his marriage, from asserting it was an invalid marriage by reason of the Act of Parliament.

(a) 2 Sw. & Tr. 88.

Now, I quite concur in the view that, as a general rule, that which would be an estoppel between party and party, will not be an estoppel between Crown and subject; but I am not prepared to affirm, that where a transaction arises,—a transaction to which criminality is attached by the law,—a responsibility may not arise from conduct in the transaction against which the penal law is levelled, that would disentitle the party to say he did not hold the character which, for the purpose of effecting the crime, he professed to hold. The case of *The Queen v. Orgill* (a) has been canvassed as a solitary authority. But it seems to have been decided upon a ground not dissimilar to those which governed the decision of the Judges in *The Queen v. Edwards* (b).

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These are the only observations with which I think it right to trouble the Bench or the Bar; and I only fear that in making them I have impaired the strength and continuity of the arguments which have been used by my Brethren who preceded me, who entertain the same opinion that I do, and in whose judgment I entirely concur. Holding the opinion of this case that I do, I am not perhaps called on to express any opinion on the statute of 19 G. 2; yet I cannot refrain from stating my concurrence in the opinion so well enunciated by my Brother CHRISTIAN, that the time which should elapse between the undoing of the effect of that statute, and the pronouncement of the judgment of this Court, ought to be as short as is consistent with the sobriety of legislation.

MONAHAN, C. J.

I need not say that, as I differ from the majority of the Court, it is with great diffidence I proceed to state shortly the reasons for the opinion I have formed as to what is the true construction of the statute. The words are "whoever, being married, shall marry any other person during the lifetime," &c., being nearly the same as those in the earlier statutes on the subject.—From the nature of the thing dealt with by the Act, it is agreed that the first marriage must have been a valid one; otherwise the relation of husband

(a) 9 C. & P. 80.

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(b) Russ. & Ry. 283.

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E. T. 1866. and wife cannot exist. The question is, what construction we are to put on the words "shall marry." From the very nature of the case, it is utterly impossible to construe these words as "enter into a legal marriage," because from the earliest time bigamy and polygamy having been illegal and void, the marriage prohibited by the Act cannot be a legal, binding marriage. I therefore feel myself at liberty to give to the words that construction which will be most consistent with the object of the Act. Now the object of this Act must have been to punish a man who, having one wife, went through the ceremony of marriage with another woman, and induced her to become his wife; and I do not feel myself called on to add the words which would have been a valid ceremony but for the previous marriage. If I were called on now, for the first time, to form an opinion on this Act, I should come to the conclusion which Lord Denman did in *The Queen v. Brawn* (a); for I find it utterly impossible to distinguish this case from that before him. In that case the marriage was prohibited by words the same as we have here, "shall be null and void to all intents and purposes." I, therefore, cannot see any possibility of distinguishing one case from the other. That case was reported in 1843, and has been cited and referred to in all the text-books from that time to the present. It is cited in the last edition of *Russell on Crimes*, edited by a distinguished and able criminal lawyer, Mr. *Greaves*. With respect to the other cases, I think that they are not in point. In this case, the second marriage was *prima facie* valid at Common Law, having been celebrated by a priest in orders, though by statute rendered invalid, as celebrated between a Protestant and a Roman Catholic.

I may say that I have thus shortly stated my reasons, because I adopt the clear and, in my mind, convincing judgment of my Brother O'HAGAN. I shall conclude by saying that I consider *The Queen v. Brawn* rightly decided, and undistinguishable from the present case; and, therefore, I am of opinion that the conviction should be upheld.

(a) 1 Cox C. C. 144.

LEFROY, C. J.

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In this case I wish sincerely that I felt myself at liberty to concur in the judgment of the minority of the Court; but I feel myself coerced to take a different line; and that line I take upon higher authority than that upon which the LORD CHIEF JUSTICE OF THE COMMON PLEAS has rested his opinion. He relied mainly on the judgment of Lord Denman. I found my judgment upon the opinion of all the Judges in England, including Lord Denman, given to the House of Lords, and adopted by that House in the case of *The Queen v. Millis*.

That judgment depends, as our judgment must do, upon the true construction of the Act upon which this indictment was framed. The judgment there was that the word "marry," when it occurs secondly in the Act, should receive the same interpretation as when it first occurs in the Act. Lord Denman was a member of the House of Lords, and, if I mistake not, was present at the delivery of the judgment in *The Queen v. Millis*, and yet he did not interpose to support the previous decision he had made, and on which, if we were now to act, we should be setting it up against the opinion of the Judges sanctioned and acted on by the House of Lords. We all know that the law is beyond any doubt, that if the first marriage be not a valid marriage, the second marriage could not constitute the offence of bigamy; and, therefore, to constitute the offence in this case there should have been that which, but for the existence of a previous marriage, would be a valid marriage. Now, instead of this, the ceremony which has taken place as a marriage is, by Act of Parliament, made null and void; and the Act of Parliament which makes it so, though part of a system, the main portions of which have been removed, has yet been left standing. It is under that Act the second marriage in this case must be sustained, if it can be sustained at all. But observe how that Act deals with this second marriage—it declares by express words, a marriage celebrated as this has been "is to all intents and purposes null and void." If, therefore, the second marriage must be as the first, it is impossible that in this case the conviction can be sustained. For a long time I considered the question, from an anxiety to sustain a conviction

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I feel myself precluded from going into a consideration of the prior cases, from weighing them or giving any value to them as authorities, as they must give way to the superior authority of the House of Lords.

Under these circumstances, I feel bound, in point of law, to decide against the conviction ; but certainly it is an obligation from which I hope every one will be freed on any future occasion by an intervening Act of Parliament to provide for an offence so grievous, so mischievous as that for which this prisoner stands convicted, but from the punishment of which he must escape.

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GREENE v. LECLERC and Others.

LECLERC plaintiff in Error; GREENE defendant in Error.*

(*Exchequer.*)

May 31.
M. T. 1865.
Nov. 15, 23,
25.
E. T. 1866.
May 4.

UPON the 25th of January 1851, an action of ejectment for non-payment of rent was brought by John Greene senior, as plaintiff, against Mary Abb Leclerc, John Andrew Leclerc, Robert Leclerc, Charles Leclerc, Benjamin Leclerc, Thomas Kinsella, Owen Kelly, John Kinsella, John Whelan, Michael Maher, Michael Lyons, Patrick Bryan, Thomas Fitzgerald, and Patrick Whelan, defendants. Upon the 27th of February 1851, a Parliamentary appearance was entered for the defendants, as follows:—

"Court of Exchequer. Docket of Parliamentary appearance:
"No. 140. Mary Abb Leclerc, Andrew Leclerc, and persons convened at the suit of John Greene senior. The defendants Mary Abb Leclerc, John Andrew Leclerc, Robert Leclerc, Charles Leclerc, Benjamin Leclerc, Thomas Kinsella, Owen Kelly, John Kinsella, John Whelan, Patrick Bryan, Thomas Fitzgerald, and Patrick Whelan this day appear (pursuant to the statute) to the writ of summons in ejectment in this cause, by Robert Mercer, attorney for the said defendants. John Arthur Hunter, plaintiff's attorney. Dated this 27th of February 1851."

Judgment in ejectment was entered upon the 10th of March 1851 against all the defendants.

In error in fact by defendants, the memorandum of error directed by the 179th section of the Common Law Procedure Act 1853, to be lodged with the Master of the Court, need not be signed by all the defendants in the cause: it is sufficient if it be signed by those of the defendants who allege error, or their attorney. Where there are several defendants, the 179th section still necessitates the proceeding by summons and severance in error in fact, after the lodgment of the memorandum of error.

Therefore an assignment of error by two out of fourteen defendants, without having given to all the defendants by summons and severance the option of joining or not is null and void. An assignment of error by two defendants, when only one signed the memorandum of error, is void. Error in fact lies for the appearance of an infant by attorney.

Semble—Whether the 175th section, which purports to abolish summons and severance in error in law, applies to error in fact or not, the record must, in some way, by suggestion or otherwise, show that the other defendants declined to join in the assignment of error, or had an opportunity of electing to do so.

* *Coram* FIGOT, C. B., FITZGERALD and HUGHES, BB.

T. T. 1865. £242. 11s. 3d.; that the rent was subsequently reduced to £218. 7s.;
Exchequer. that, at the death of Charles Leclerc, in October 1850, there was
 GREENE due to John Greene senior, for one year's rent, and the balance of
 v. a half-year up to the 29th of September 1850, £251. 10s., and
 LECLERC. possession was given up by Mrs. Leclerc and her children without
 any objection or remonstrance on their part: and that if an
 appearance was erroneously entered for John Andrew Leclerc,
 yet he was not a necessary party to said ejectment proceedings,
 and therefore no error exists therein.

The conditional order for the issue of the *scire facias ad audiendum errores* was made absolute upon the 31st of May 1865. The Court stating that they made the order with reluctance, but felt that its issue was *ex debito justitiæ*.

On the 7th of June 1865, a writ of *scire facias ad audiendum errores* was issued in the Exchequer of Pleas:—"Victoria, by the
 "grace of God, of the United Kingdom of Great Britain and Ire-
 "land, called Queen, Defender of the Faith, and soforth; to the
 "Sheriff of the county of Kildare, greeting. Because in the record
 "and proceedings, and also in the giving of judgment in an action
 "which was in our Court of Exchequer of Pleas, between John
 "Greene senior, the plaintiff, and Mary Abb Leclerc, John Andrew
 "Leclerc, Robert Leclerc, Charles Leclerc, Benjamin Leclerc,
 "Thomas Kinsella, Owen Kelly, John Kinsella, John Whelan,
 "Michael Maher, Michael Lyons, Patrick Bryan, Thomas Fitz-
 "gerald, and Patrick Whelan, the defendants therein, manifest error
 "hath intervened, to the great damage of the said John Andrew
 "Leclerc. And the said John Greene senior, the plaintiff, has died
 "since the passing of the said judgment; and John Greene junior,
 "the eldest son and heir-at-law of the said plaintiff, is now his
 "executor, and is also his devisee of the lands comprised in this
 "action, as by the complaint of the said defendant John Andrew
 "Leclerc we are informed; and we, being willing that the error (if any
 "there be) should in due manner be corrected, and full and speedy
 "justice done to the parties aforesaid in this behalf, command you
 "that by honest and lawful men of your bailiwick you make known to
 "the said John Greene junior, that he be before us on Saturday, the

"10th of June 1865, in our Court of Exchequer of Pleas, to
 "hear the record and proceedings aforesaid, if it shall seem expedient
 "for the said John Greene junior, and further to do and receive
 "what our said Court shall then, and there consider in this behalf.
 "Witness, the Right Hon. D. R. PIGOT, LORD CHIEF BARON, &c.
 "this 7th day of June 1865."

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The memorandum of error was lodged on the 15th of June 1865. Error was assigned by John Andrew Leclerc and Benjamin Leclerc, who had elected under the 178th section of the Common Law Procedure Act (1853) to be joined, on the 28th of June; and John Greene junior joined in error on the 12th of July, and pleaded *in nullo est erratum*.

The point for argument by the defendants John A. Leclerc and Benjamin Leclerc, the plaintiffs in error, was, that in the record and the giving of judgment there was error in fact in this, with respect to each of them, that he having been an infant under the age of twenty-one years, an appearance had been entered for him in this action by Robert Mercer, Esq., as his attorney, and that he did not appear by guardian.

R. Dowse, and J. A. Byrne, in support of the writ of error M. T. 1865.
 in fact. Nov. 15.

These proceedings are framed under the 179th section of the Common Law Procedure Act 1853. John Andrew Leclerc is entitled to bring this writ of error as being the heir of his father Charles Leclerc deceased. This writ is returnable into this Court: 1 *Wms. Saunders*, p. 346, G, note P. The 154th section of the English Common Law Procedure Act 1852 is identical with the 179th section of the Irish Act: 1 *Archbold's Prac.*, 10th ed., p. 520; *Chitty's Forms*, 10th ed., p. 304. The note of the receipt of the memorandum of error states, in conformity with the 175th section of the Common Law Procedure Act 1853, the names of the two defendants who alone bring this writ of error. Summons severance is abolished by that section. As a change of parties subsequent to the judgment complained of has taken place, the plaintiffs in error have proceeded by *scire facias ad audiendum errores*,
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M. T. 1865. in lieu of a suggestion of error: *Curlewis v. The Earl of Mornington* (a). An infant cannot appoint an attorney; therefore error in fact lies, for the appearance of an infant defendant by attorney and not by guardian: *Jaques v. Casar* (b). A parliamentary appearance cannot be entered by attorney for an infant: *Leonard v. Annesley* (c). The 12th General Order (1850) makes the appointment of a guardian imperative when entering an appearance for an infant defendant under the 13 & 14 Vic., c. 18, s. 17.

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Macdonogh, H. E. Chatterton, and F. L. Dames, for the defendants in error.

The plaintiffs in error had no interest in the lands the subject of the ejectment upon the decease of their father Charles Leclerc; for the lease of 1840 was a freehold carved out of a chattel interest, and therefore valid for the life of the lessor only: 2 *Preston on Abstracts*, p. 2; *Butt's case* (d); *Saffery v. Elgood* (e). It was not necessary to the validity of the ejectment in 1852 that John Greene senior should have set up a representative of the deceased tenant: *Nugent d. Keane v. The Earl of Bantry* (f); *Jones v. Murphy* (g). It was necessary to serve only the persons in possession of the lands; they were served. Mrs. Leclerc was not residing in the mansion-house when the ejectment was brought. It was not necessary to serve a notice to quit upon Mrs. Leclerc or her children: *Longfield on Ejectment*, p. 279. The infant defendants appeared by attorney, of their own accord. The plaintiffs could not prevent their doing so; it is a fraud upon the Court. The attorney should have been committed: *Goodwright v. Wright* (h). One appearance was properly entered for all the defendants, in accordance with the 17th section of the 13 & 14 Vic., c. 18 (the Process and Practice Act), which abolished the judgment against the casual ejector, and under which alone an appearance could be entered for the defendants. Prior to the

(a) 27 Law Jour., N. S., Q. B., 269.

(b) 2 Wms. Saund. 101 w.

(c) 1 Smythe, 96.

(d) 7 Coke, 23 a.

(e) 1 Ad. & E. 191.

(f) 2 Hud. & B. 156.

(g) 2 Jebb & Sy. 323.

(h) 1 Stran. 33.

passing of that Act judgment against the casual ejector was conclusive, if none of the defendants took defence to the action.

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R. Dowse, in reply.

Before the passing of the Process and Practice Act 1850 an infant defendant was put to his cross-ejectment. The 7th section of that Act empowered the plaintiff to enter an appearance for the defendant who did not appear; the 10th section extended that power to actions of ejectment; and the 17th section enacted that one appearance only should be entered for several defendants. The 12th General Order 1850 first deals with the case of adult defendants who have not appeared; then it provides for infant defendants, and directs that the Master of the Court shall act as guardian for them, and enter appearances for them. 1 *Ferg. Proc. and Prac.*, p. 714; *Tidd's Prac.*, p. 92. The jurisdiction of this Court, when error in fact is before it, is laid down in *Jaques v. Casar* (a). As to costs, the 201st General Order 1853 enacts that costs in error shall be taxed and allowed as costs in the cause. The statute does not alter the law as to liability to costs in error; therefore, when a judgment is simply reversed, the successful party is not entitled to costs in error: *Ivers v. Bainbridge* (b); *Fisher v. Bridges* (c); *Marshall v. Jackson* (d); *Wyvil v. Stapleton* (e); *Bell v. Potts* (f). It is true that these were cases of error in law; but it must be assumed that costs in error in fact are governed by the same principles.

At the close of the argument the Court stated that the non-joinder of the other defendants in these proceedings in error was pressing upon them, and that they wished that point to be re-argued.

Macdonogh, for the defendant in error.

The Court should quash this proceeding in error *ipso motu*; or they should reverse the judgment below as against the two

Nov. 23.

(a) 2 Wms. Saund. 101.

(b) 8 Ir. Com. Law Rep. 150.

(c) 4 El. & B. 666.

(d) 4 El. & B. 669, note.

(e) 1 Str. 615.

(f) 5 East. 48.

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 LECLERC. plaintiffs in error only. The children of Charles Leclerc were not necessary parties to the ejectment. The practice in proceedings in error, before the passing of the Common Law Procedure Act 1853, was as follows—where a judgment had been obtained against several defendants, a writ of error by one did not lie: *Hacket v. Herne* (a); *Knox v. Costello* (b)—where the reason is stated to be the inconvenience which would arise if, when there was judgment against several, every defendant might bring a writ of error by himself, and thus delay the plaintiff from his execution for a long time. All the persons against whom a joint judgment is given must join in a writ of error; a writ of error is not amendable at Common Law, nor by any of the statutes; for all amendments are granted for the support of judgments; but the principal design of a writ of error is to reverse them: *Waller v. Stoker* (c); *Ginger v. Cowper and Miles* (d); *Jaques v. Caesar* (e). If any of the defendants refuse to appear and assign error, they should be summoned and severed: *Hacket v. Herne*; *Brewer v. Turner* (f). It is the duty of the Court to quash the writ: *Andrews v. Cromwell* (g); *Frescobaldi v. Kinaston* (h). The writ was quashed on motion for non-joinder: *Cowper v. Ginger* (i). In the *Thesaurus Brevium*, p. 301, the writ of summons will be found. The first step is the *sci. fa. ad audiendum errores*, in consequence of the judgment below having been *ad grave damnum ipsorum—i. e.*, of all the defendants. If all the defendants would not join in assigning error, summons and severance followed; then judgment *quod sequatur solus* was entered in the name of the defendant who wished to bring error: he alone is then answerable for costs. Although the present proceedings are brought under the 175th section of the Common Law Procedure Act 1853, summons and severance should have preceded the issue of the *sci. fa. ad audiendum errores*; for that writ concludes that manifest

(a) Carth. 7.

(c) 1 Lord Ray. 71.

(e) 2 Wms. Saund. 101.

(g) Cro. Eliz. 891.

(b) 3 Burr. 1793.

(d) 2 Lord Ray. 1403.

(f) 1 Str. 233.

(h) 2 Str. 783.

(i) 1 Str. 606.

error hath intervened "*ad grave damnum*" of J. A. Leclerc alone, M. T. 1865. out of some thirteen defendants, when it should have been "*ad grave damnum ipsorum*," which is bad: *Ginger v. Cowper and Miles* (a). This is the first fatality in these proceedings. Benjamin Leclerc joined J. A. Leclerc in the assignment of error filed the 25th of June. They state that they were both under twenty-one years of age in 1852, and pray a total reversal of the judgment below, and that they may be restored to their rights; omitting all allusion to the other twelve defendants. If the judgment below is to be reversed, it should be reversed only so far as John A. and Benjamin Leclerc are concerned. It is laid down in 3 *Bac. Abr.*, tit *Error* (K), p. 105, that a defendant in ejectment cannot assign for error, that, being an infant, he appeared by attorney. At Common Law there is no inconsistency in a judgment being entered against certain defendants while proceedings remain pending against others. Judgment against the casual ejector bound all the defendants in ejectment who had been served, and who had not taken defence; yet a pending action might proceed against such defendants as had taken defence. The plea of *in nullo est erratum* admits that the record is perfect; therefore, while error in law, which taints the whole record, cannot be severed, error in fact, as here, upon a judgment in ejectment being outside the record, can be severed: *Vavasor v. Faux* (b); *Ratcliff v. Burton* (c); *Green v. Walker* (d). If an ejectment be brought for a mansion-house, lands and bog, and if all the defendants are served save one, and if he, an infant, holding one acre, appears by attorney, judgment against the casual ejector binds all the defendants. But, if the judgment be reversed by the infant defendant upon error in fact, the reversal as to his own acre will not operate as a general avoidance. "If an infant and one of full age join in "a fine, and the infant after brings error for the reversal thereof, "it shall be reversed *quoad* the infant only:" *Bac. Abr.*, tit. *Error* (M); *The Earl of Clanrickarde's case* (e); *Parker v. Law-*

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(a) 2 Lord Ray. 1403.

(b) 1 Wils. 88.

(c) *Cas. temp. Hard.* 127.

(d) 2 Lord Ray. 891.

(e) Hobart, 278.

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rence (a). A special partial defence to an ejectment for non-payment of rent may be taken: 1 *Ferg. Prac.*, p. 590. Where a judgment is entire, or on a single count, or for error in law, it cannot be severed, but must be reversed entirely: *Bird v. Orms* (b); *Lloyd v. Pearse* (c), 2 *Tidd's Prac.*, 8th ed., p. 1236; *Everard v. Paterson* (d); *Rex v. Marlborough* (e).

The rule of law laid down in the cases last cited is, that a judgment being an entire thing, must be reversed entirely; but that when a judgment is not entire and single in its nature—when there are several subject-matters affected by the judgment—when the error affects one only of several defendants, who are not injured by the error of which he complains—the judgment may be severed and reversed, as to one or several of many defendants. On these grounds these proceedings in error are bad. First; the *sci. fa. ad audiendum errores* concludes “*ad grave damnum*” of one defendant only, when it should have alleged that all of thirteen defendants had been aggrieved. Secondly; the assignment of error, which is substituted for the old writ of error, is in the name of only one defendant—it should be in the name of all. Thirdly; the assignment of error is by two defendants. How can the refusal of the other defendants to join in these proceedings be proved to the Court? Not by *pais* surely. Therefore the other defendants should have been summoned and severed.

Dowse (with whom was *J. A. Byrne*), for the plaintiffs in error.

In the 169th section of the Common Law Procedure Act the words “writ of error” are used as comprehending both error in fact and error in law. The 175th section must apply to both forms of error; otherwise the 179th section, in which alone the phrase “error in fact” first occurs, is the only section which deals with the procedure for error in fact. Admitting that, when the words “error in law” occur at the beginning of a section, as in the 170th, 171st, and 173rd, they govern the whole section, “error”

(a) Hobart, 70.

(b) Cro. Jac. 289.

(c) Cro. Jac. 424.

(d) 6 Taunt. 645; S. C., 2 Marsh. 308.

(e) Cro. Jac. 302.

simpliciter, as used in the 175th section, must include both error in law and in fact. Why should the Legislature abolish by that section summons and severance in the case of error in law, and not in error in fact also? The meaning of the 176th section is, that a suggestion of error is sufficient; and, although there may be no suggestion of error on this record (since it is not settled what a suggestion is), there appears upon the record what amounts to a suggestion. There is nothing in the 175th section to show that it is necessary to state upon the face of the proceedings in error that thirteen out of the fourteen defendants have refused to proceed in error. *Prima facie* all the defendants should join in assigning error. In all the cases cited on the other side as to non-joinder of all the defendants, all the defendants had the same ground of complaint, and were all equally aggrieved by the judgment. Here, of the fourteen defendants, John A. and Benjamin Leclerc are the only persons aggrieved. The grievance inflicted is the foundation of the writ of error: 2 *Tidd's Prac.*, 8th ed., p. 1188. If a *feme covert* bring error the husband must join, otherwise the husband might be aggrieved by losing the society of his wife; and in case of action brought against a *feme covert* and others, they *may* all join with the husband in bringing error: 2 *Tidd's Prac.*, p. 1189; 1 *Roll. Abr.*, p. 748 (18). Therefore the rule that all the defendants must join in error does not apply where the defendants who have joined were not aggrieved, and where those two only who were aggrieved have taken proceedings. Several writs of error cannot be brought by the other defendants, who have no further remedy. The defendants in error should have moved to quash these proceedings for non-joinder. Their opposition is now too late: *Laroche v. Wasborough* (a); *McNamara v. Fisher* (b). The defendants who have not joined can never take proceedings in error; for they are barred by the 166th section of the Common Law Procedure Act 1853, as six years have elapsed since the judgment against them was entered. The other defendants are disqualified by the statute; therefore they need not be joined in the assignment of error: *Oliver v.*

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(a) 2 T. Rep. 737.

(b) 8 T. Rep. 302.

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Hunning (a). In that case, one of two defendants was outlawed after judgment; error was brought by the other defendant; and the objection on the ground of non-joinder was overruled, because the writ as to the other defendant was determined by the outlawry. The other defendants cannot bring error, unless the defendant in error permits them to do so by not pleading the statute in bar: 2 *Tidd's Prac.*, 9th ed., p. 1196; *Higgs v. Evans* (b). Since the reason of the rule that all the defendants should join, viz., to prevent a multiplicity of writs of error, does not apply in this case, it is not necessary that all the defendants should join. This objection should have been taken before the *sci. fa.* issued. The plea of *in nullo est erratum* admits the record to be perfect: *Jaques v. Cesar* (c). Therefore the objection by the defendant in error cannot be sustained. The defendant in error should have moved to quash the assignment of error. If proceedings in error are framed incorrectly, they are defective from the inception. The proceeding to error is now a step in the cause by the 169th section of the Common Law Procedure Act of 1853. By the 231st section of that Act, this Court has full power to amend these proceedings in error, by adding, if they think fit, the other defendants as plaintiffs in error. It is admitted, on the other side, that this judgment can be partially reversed, as far as relates to the two plaintiffs in error; therefore it can be reversed *in toto*. A judgment against several defendants being entire, shall be reversed for the infancy of one, if they appeared by attorney, for the judgment is entire: *Beecher's case* (d). In the first place, the defendant in error should have raised this objection before joinder in error, and plea of *in nullo est erratum*: *Andrews v. Cromwell* (e). Secondly; the objection they allege does not appear upon the record; therefore the Court cannot examine into it. The 169th section abolishes writs of error in law and fact. The 175th and 177th sections of the Common Law Procedure Act 1853 deal with both error in law and error in fact: the 179th section deals partially with error in fact; it concludes

(a) 1 Lord Ray. 691.

(b) 2 Str. 837.

(c) 2 Wms. Saund. 101 f.

(d) 8 Coke, 256, note.

(e) Cro. Eliz. 891.

with an enactment (a) "that the same proceedings may be had M. T. 1865.
 "thereafter as heretofore had after the service of the rule for allow- Eschequer.
 "ances of a writ of error in fact." GREENE
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Summons and severance are abolished by the 175th section. It is laid down in *Lush's Practice*, 3rd ed., p. 660, that one of several against whom judgment has been given may now take proceedings under the section in the English Procedure Act, which is identical with the 175th of the Irish Act. Then, as summons and severance are abolished, and no substitute is provided, *omnia rite acta presumuntur*, since no motion was made to quash these proceedings at their inception.

In the third place, the objection taken by the defendants in error has no foundation in law; for the proceedings in error may be amended under the 231st section of the Common Law Procedure Act: 2 *Lush's Practice*, 3rd ed., pp. 659, 683, 688. A writ of error has been amended even upon a motion: *Verelst v. Rafael* (b); *Beecher's case* (c); *Sympson v. Juxon* (d); *Rex v. Marlborough* (e); *Castledine v. Mundy* (f); 2 *Wms. Saund.*, 101, BB.—SS.

Macdonogh, in reply.

This objection to the proceeding in error has not been taken too late; for, after *in nullo est erratum* has been pleaded, the Court may look at the record for their own satisfaction: 2 *Tidd's Prac.*, 9th ed., p. 1174. The objection does appear on the face of the record; for the judgment was given against fourteen defendants, and only one of them at first, and subsequently two, bring error. The Statute of Limitations must be pleaded by the 166th section. Summons and severance must have followed the allowance of a writ of error formerly, and must now follow of the lodgment of a memorandum of error. In writs of error *coram nobis*—i. e., error in fact—the facts were to be decided by a jury; in writs of error in law the facts were concluded; therefore the Common Law must remain in practice so far as regards error in fact. The Legislature

(a) 8 Coke, 256 note; Cro. Eliz. 891.

(b) Cowp. 425.

(c) 8 Coke, 258.

(d) Cro. Jac. 699.

(e) Cro. Jac. 303.

(f) 4 B. & Ald. 90.

M. T. 1865. intended to abolish writs of error issuing out of Chancery, and Exchequer. summons and severance in error in law. The first step was the allowance of the writ of error—then the assignment of error in fact. The next step was a declaration. The 175th section does not apply to error *coram nobis*; therefore summons and severance in error in fact is not abolished. Form No. 13 in the schedule to the Common Law Procedure Act 1853 clearly applies only to error in law; it is not traversable: and summons and severance is not necessary in case of error in law. The Court cannot amend the proceeding in error: *Ratcliff v. Burton* (a). The fact that the other defendants declined to be put on the record cannot now be added to the record: the plaintiffs in error have not filed any suggestion of the refusal of the other defendants to join; but they have assigned error in fact at Common Law.

E. T. 1866. FITZGERALD, B.
May 4.

This is a proceeding in error in fact, upon a judgment in ejectment, obtained, in the year 1851, by the plaintiff against fourteen defendants. The ejectment was for non-payment of rent; and the judgment was by default. The assignment of error is by two only of the fourteen defendants. The defendant in error, who is the son, heir-at-law, executor, and devisee of the plaintiff in ejectment, has pleaded *in nullo est erratum*; the error assigned being that the two parties so assigning error appeared in the action by attorney, they being respectively then, and also at the time of giving of the judgment, infants under the age of twenty-one years. The case having been set down for argument in the usual way, at the hearing, and after argument on the merits, an objection was taken on the part of the defendants in error, that the assignment of error by two only of fourteen defendants, not appearing to have any authority to proceed alone, is a nullity, and must be so treated.

The case of *Andrews v. Lord Cromwell* (b) seems to be an authority that, before the Common Law Procedure Act 1853, such an assignment of error would have been dealt with as null and void. Previous to the Common Law Procedure Act error was brought

(a) *Cas. temp. Hard.* 127.

(b) *Cro. Eliz.* 892.

by suing out of Chancery an original writ directed to the Court in whose proceeding error was alleged, and directing either that Court to examine the errors, or directing a removal of the record to some Superior Court for the purpose of examination. In the former case it was called a writ of error *coram nobis*, or *coram vobis*; in the latter it was called a writ of error generally, or in law. The writ was the commission or authority to the Court in which it was returnable to examine the error; and for that reason it was not amendable (except when otherwise provided by statute) by the Court to which it gave authority. There can be no doubt that in the case of a judgment by the plaintiff against several defendants, a writ of error must have been brought in the names of all the defendants, unless indeed some had died, in which case the writ ought to have alleged their deaths. The writ of error, having been obtained in Chancery, was brought to the proper officer of the Court in which the judgment was given, and a note or certificate of allowance of the writ of error was obtained from him and served on the opposite parties. In error *coram vobis*, in which there was no transmission of the record, the most material proceeding was the assignment of error. If the writ of error, though brought in the name of all the defendants, was in point of fact sued out by one or some only, then, if the others declined to join in the assignment of error, a proceeding called summons and severance took place, by which the parties so declining were summoned, their refusal was recorded, and there was an order that the parties desiring to proceed in error should proceed alone, and they might alone then proceed to assign error.

Before the Common Law Procedure Act 1853 it would, therefore, seem that, in a case like the present—first; the writ of error must have been brought in the names of all the defendants. If not so brought, the authorities show that the Court in which the error was examinable would have quashed the writ, and that the defect was not amendable. Secondly; that to warrant an assignment of error by some only of the defendants, there must have been a regular proceeding by summons and severance. If the writ was in the name of all, the writ could not be quashed, because the writ was right. In the case of *Andrews v. Lord Cromwell* the writ was

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Before the Common Law Procedure Act 1853 it would, therefore, seem that, in a case like the present—first; the writ of error must have been brought in the names of all the defendants. If not so brought, the authorities show that the Court in which the error was examinable would have quashed the writ, and that the defect was not amendable. Secondly; that to warrant an assignment of error by some only of the defendants, there must have been a regular proceeding by summons and severance. If the writ was in the name of all, the writ could not be quashed, because the writ was right. In the case of *Andrews v. Lord Cromwell* the writ was

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E. T. 1866. right in this respect; and it was on another ground altogether that
Exchequer. it was quashed; but it was distinctly held that, though the writ
 GREENE was good, the assignment without summons and severance was a
 v. nullity.
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By the 169th section of the Common Law Procedure Act 1853, a writ of error is abolished; and it is provided, that a proceeding in error shall be a step in the cause in which error is supposed. The 179th section provides, "That *either party* alleging error *in fact* "may deliver to the Master of the Court a memorandum in writing "in the form No. 14, contained in the schedule B to this Act "annexed, or to the like effect, *entitled* in the Court and *cause*, and "signed by the party or his attorney, alleging that there is error "in fact in the proceedings; together with an affidavit of the "matter of fact in which the alleged error consists; whereupon "the Master shall file such memorandum and affidavit, and deliver "to the party lodging the same a note of the receipt thereof: and a "copy of such note and affidavit may be served on the opposite "party or his attorney; and such service shall have the same effect, "and the same proceedings may be had thereafter as heretofore had, "after the service of the rule for allowance of a writ in error in "fact." The writ of error is abolished, and the first proceeding in error is a memorandum of error; that given in the case of error in law by the 170th section; that given in the case of error in fact by the section just stated.

I confess it appears to me that the memorandum in error need not purport to be the memorandum of all the defendants, but only of those who intend at all events to allege error. It must be entitled in the cause, and therefore must show who all the defendants are; but, as it must be signed by the parties whose allegation it is, or their attorney, I do not see how it can be made, even in form, the allegation of those who do not sign it by themselves or their attorney. There is a great difference in this respect between the writ of error, which was in the nature of a new action, and the memorandum of error, which is a step in the cause.

I am disposed to think, therefore, that the objection which would have applied to a writ of error—viz., that it was not brought in the

names of all the defendants—will not apply to the memorandum of error, which is an allegation requiring the signature of the parties making it, or their attorney. But the matter of substance—viz., the binding of the other defendants—remains still to be disposed of. And assuming the true meaning of the 179th section of the Common Law Procedure Act to be, that all proceedings in error in fact, after service of the receipt of the memorandum in error, shall be the same as they were in error in fact before the Common Law Procedure Act after service of the rule of allowance, I cannot, I confess, see how the proceeding by summons and severance, in order to warrant an assignment of error by some defendants, can be dispensed with. The other defendants who will be bound must have an opportunity of electing whether they will or will not join in the assignment of error. Unless named in the writ of error, which was in the nature of a new action, they would not have been bound at all; but the proceeding in error being now in the cause itself, they necessarily must be bound, and surely cannot be bound without notice.

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I shall now state the mode of proceeding actually adopted in the case before us. It seems that the plaintiff in ejectment had died after judgment, and the first proceeding taken was to issue out of this Court a *scire facias ad audiendum errores* directed to the present defendant in error, as the son, heir, executor, and devisee of the deceased plaintiff, and commanding him to be in Court on the 10th of June 1865. The next proceeding by the plaintiff in error was the delivering and filing of a memorandum in error: that document is entitled in the original cause, and it contains the very words given in the schedule to the Common Law Procedure Act, except that instead of saying "the defendant" it says "the defendant John Andrew Leclerc, by whom this proceeding in error is brought." If I be correct in the view I take of the 179th section, it is in this respect unobjectionable.

The next proceeding is the assignment of error. The assignment of error purports to be made not only by the defendant who delivered and filed the memorandum, but by another defendant; without, however, showing in any way how the remaining de-

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LECLERC. defendants have been dealt with; nor, so far as I can see, was anything in fact done in relation to them. To this assignment of error the defendant in error has pleaded *in nullo est erratum*; but it appears to me that the assignment of error by two only of the defendants is wholly unwarranted by the record. I think that assignment of error must be treated as a nullity; and I think it must be so treated whether, as was argued, the 175th section of the Act applies to the case of error in fact, or whether it does not. I acknowledge that there seems to me the greatest difficulty in applying the language of that section to the case of error in fact; but, even if it can properly be so applied, the only effect would be to render the particular proceeding by summons and severance unnecessary, and which indeed may strictly be inapplicable to what is not a new action: but the 175th section itself would still seem to me to render it necessary that the record must in some way, by suggestion or otherwise, show that the other defendants declined to join in the assignment of error, or had an opportunity of electing so to do.

Treating the assignment in error as a nullity, the question arises of what we ought to do. It must, in my opinion, be set aside. And it seems to me that we cannot allow anything to stand upon the memorandum of error except, perhaps, the appearance of the defendant to the writ of *scire facias*.

Having regard to the mode and stage at which the objection has been taken, I think there ought to be no costs, more particularly as the mode of proceeding under the Act of Parliament is anything but clear from the statute, and this is the first case which has been brought under our notice.

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JAMES MURPHY

v.

THE HON. W. H. A. FIELDING and FRANCIS R. BACON.

Nov. 17.

THIS was an action for assault and false imprisonment. It appeared that the plaintiff was an officer in the United States army, and had been imprisoned, under the Habeas Corpus Suspension Act, in Mountjoy Prison, and had been thence removed by the military authorities to be tried by Court-martial. On the Court-martial he was acquitted, and then he was again imprisoned in Mountjoy Prison, under the Habeas Corpus Suspension Act. This action was against the Assistant Adjutant-General of the Forces, Dublin District, and the Governor of the Military Prison Arbour-hill; and the offences complained of were, the taking the prisoner out of Mountjoy Prison and keeping him in military custody for the purposes of the said Court-martial. The defendant Fielding simply traversed the averments in the plaint. The defendant Bacon pleaded the following defence:—"That the action is brought against him "solely for acts done by him as Governor or Provost-Marshal of "the Military Prison of Arbour-hill in the city of Dublin, duly constituted and maintained under the Acts of Parliament for the time "being in force for punishing mutiny and desertion, and for the "better payment of the army and their quarters, and in relation "to the custody and imprisonment of the plaintiff as a military "offender with and by the defendant as such Governor or Provost-Marshal; and he further says that he is not guilty, and therefore "he defends the action."

Butt (with him *O'Loghlen*) now moved to set aside this defence.

The general issue has been abolished in this country, but the Mutiny Act enables any one to plead the general issue for anything done under the Mutiny Act. That Act makes no exception of the

Plea to an action for false imprisonment, that the action is brought against defendant solely for acts done by him as Governor or Provost-Marshal of the Military Prison of A., duly constituted, &c., under the Acts for the time being in force for punishing mutiny, &c., and in relation to the custody and imprisonment of the plaintiff as a military offender, with and by the defendant as such Governor and Provost-Marshal; and he further says that he is not guilty.

Held—That the plea should be amended by striking out the inducement, and saying "that defendant pleads not guilty under and by virtue of the Mutiny Act and the several Acts incorporated therewith."

M. T. 1866. Irish practice: 29 *Vic.*, c. 9, s. 89. The inducement here is embarrassing; it was never intended as a defence to the action; it is only an introduction to show how the defendant was entitled to plead the general issue. My first objection is, that "not guilty" is not a good plea, in this country. Secondly, that if it is a good plea the defendant ought not to incumber the record with that inducement.—[*PIGOT*, C. B. It is rather anomalous, but still good for you, for they must prove the inducement.]—Yes; if the issue on that plea whether it is true in substance and in fact be accepted; but I do not know whether it will or not. Thirdly; this plea varies from the direct words of the Mutiny Act. Let them take a direct issue whether these acts are within the Mutiny Act or not. The real meaning of the statute in England is, that the defendant shall be enabled to give certain evidence under this plea; for in England the general issue exists without the statute. He merely puts in the margin by statute.—[*DEASY*, B. Is not this matter of demurrer?]
 —I think not; but further, he has avoided bringing these acts within the meaning of the Mutiny Act, so everything might be found for him, and yet our case might be quite good. Why does not he say that the action is brought for acts done under the Mutiny Act? There is nothing in the Mutiny Act to authorise commitment to this prison. He ought to have said that the acts were done in pursuance of the Mutiny Act. It is the duty of the Government to set aside a prison for military purposes, under the Act. What this plea amounts to is, that if, under any circumstances, the defendant takes a man into custody "as a military offender," he is entitled to plead not guilty under the Act. The defendant is not entitled to the plea of not guilty. Having a plea he is not entitled to, he must be dealt with accordingly.—[*SULLIVAN*. This is clearly then a case for demurrer.]—[*FITZGERALD*, B. We must know whether this inducement is part of the plea.]—"Not guilty" is a sham plea unless the defendant shows he is entitled to it.

Sullivan, Harrison, Murphy, and Boyd, in support of the defence, were not called on as to the first point, whether the defendant was

entitled to plead the general issue.—[PIGOT, C. B. The Common Law Procedure Act is suspended by the Mutiny Act *pro hac vice*.—*Exchequer.* FITZGERALD, B. The statute says expressly what the plea shall be.]—The general rules framed under the Mutiny Act direct that the party should put in the margin “by statute.” That was the course adopted in *Allen v. The Duke of Cambridge*.^{*} There the pleadings appear with the words “by statute” in the margin. Bacon says:—“I am governor of a military prison; and it is imprisonment with me as such governor that is complained of, and to that I “plead not guilty.” It is never the practice to say I am not guilty, because I acted under a particular statute. *Richards v. Easto* (a) decides that I might say “not guilty” without anything else.—[FITZGERALD, B. It is a necessary part of your defence that the statute was passed since the Common Law Procedure Act, for all the preceding Acts giving the general issue were repealed by that Act, and you should not say “not guilty by statute,” but “not guilty” by a particular statute passed since a particular year.]—I am under no obligation to add that, but I am willing to add it thus, say “not guilty,” and then put in the margin the Mutiny Act of this year.—[FITZGERALD, B. The proper course then will be to set aside this plea.—PIGOT, C. B. What are your difficulties in saying that you acted under the statute?—One is, that there is a question how far the Mutiny Act incorporates the Articles of War.—[PIGOT, C. B. Do you want to rely on the Articles of War?—The plea is put in in pursuance of the statute, a part of our evidence is the Articles of War.—[PIGOT, C. B. Let us consider the state of the record. Under the general rule in England will this not be incorporated? If so you may be met by a bill of exceptions. It will allege that you are not allowed to show anything but a denial of the fact.]—Well, to show our difficulty, I may mention that the 7 G. 4 allows the general issue, and we may have to rely upon that.—

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^{*} This case is referred to in *Simmons on Court-martials*, p. 283, 5th edition. Counsel cited it from the information obtained by the defendant from the Crown in England.

M. T. 1866. [Pigot, C. B. That is repealed.]—But it is re-enacted by the
Exchequer.
 Mutiny Act of this year.

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Per Curiam.

Strike out the inducement, and then say that you plead "not guilty" under and by virtue of the Mutiny Act and the several Acts incorporated therewith.

Defence amended accordingly.

JAMES MURPHY*

v.

HON. W. H. A. FIELDING and F. K. BACON.†

Nov. 22.

The Court will, under special circumstances, postpone a trial from one After-sitting to another, where it appears, from the affidavit of defendant's attorney, that there is a reasonable prospect of defendants' being enabled by the delay to procure material witnesses; though the affidavit does not specify the witnesses, nor the particular facts they are expected to prove.

SULLIVAN (with him *Harrison, James Murphy, and Boyd*) now applied to the Court for an order to postpone the trial of this action. The case was for trial at the next After-sittings; and it appeared from the affidavits of Mr. Roche, defendants' solicitor, that the plaintiff had been arrested by the defendant, on the supposition that he was a man named Lynch, a deserter from H.M.'s 81st regiment. This allegation of the plaintiff's identity with Lynch would be part of the defendants' case, but the 81st regiment was at present quartered at Gibraltar; and, consequently, defendants could not procure the necessary witnesses to identify the prisoner. The affidavit stated, on information and belief, that if the trial were postponed witnesses could be procured amongst the soldiers of this regiment to substantiate this case.

* See this case reported on another point, *supra*, p. 375.

† Before the Full Court.

Butt (with him *O'Loghlen*).

M. T. 1866.

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This is an application to enable the defendants to look for evidence, rather than one to enable them to produce evidence which they have. Everything was done, before Murphy was brought to Court-martial, to ascertain whether he was a deserter or not. The man was imprisoned for months by military authority; and the military authorities had all that time to make out evidence on this very point. Mr. Roche cannot say that these soldiers have any evidence to give; he only infers that they have.—[DEASY, B. These witnesses may be for the purpose of showing that he was at one time a soldier in the British army; not that he is the man Lynch they supposed him to be at the Court-martial.]—But, further, the affidavit does not state any time when these soldiers will be ready: it ought to state when the witnesses are likely to be here.—[FITZGERALD, B. Is it not enough if it shows reasonable ground to expect that they will be produced at some reasonable time?]—No; I think not; *Leech*, p. 537—"In the former case it must be stated at what time they will be ready."—[FITZGERALD, B. But is there any rule that it will not be sufficient if the Court are satisfied upon the facts that the witnesses will be forthcoming within a reasonable time?]—The rule is founded on a case in 1 *Wm. Black.*, p. 486. Further, the affidavit does not state that these are material witnesses to the inquiry.

O'Loghlen.

The defendants here are really the military authorities. Why did not they obtain these men before? It is only six days from Gibraltar to Southampton. They might be here yet in plenty of time before the close of the After-sittings. This is really an application for delay.

Murphy, in reply, was not called on.

FRIGOT, C. B.

Motions of this kind are not to be determined by any regard to a rule of law. We must look to the nature of the transactions out of which the litigation arises, and to the peculiar circumstances of each

M. T. 1866. *Eschequer.*
 MURPHY
 v.
 FIELDING. case. This case is one of a peculiar kind, and one in which the plaintiff is quite entitled to raise the question which is to be tried in the action; but it is also one in which the defendant must have some latitude for his defence. His defence is, that any person who ever was in the army would be liable in law to be placed in the position in which plaintiff complains that he was placed by the two defendants; and that the plaintiff was once in the army. Major Bacon ought to have every facility given him to make this defence. He was himself liable to the military tribunals for the discharge of his orders, as governor of this prison. He ought to have the means of applying, if he can, the law, as it affects the army, to his defence in this civil action. The writ in this case was served on the 29th of October; it was just in time for a trial in November. Some little time must be allowed a defendant in a case of some novelty to consult his advisers, and to consider the nature of his defence, and also to make his arrangements for the collection of witnesses dispersed in distant places. He points, in his affidavit, to the class of witnesses whom he requires. It is of course possible that these witnesses might be here before the sittings at Nisi Prius conclude; and it is said that the exact time is not specified when the witnesses will be in attendance. But we must give a reasonable intendment to this affidavit; and we must give a reasonable time for the production of witnesses serving in the army in a distant country. The motion seeks to have the trial postponed until the sittings after next Term. The affidavit says that these witnesses will be produced at the trial. We must assume that that trial is the trial which is to take place at the sittings next after the ensuing sittings; and those can only be the sittings after next Term.

Some observations have been made upon the want of a specific statement in the affidavit of what the witnesses are required to prove. As a general rule it is not necessary to specify the particular evidence which the witness is expected to give. In *Rez v. D'Eon* (a) the Court said:—"An affidavit in *common* form may be sufficient when no cause of suspicion appears." They add:—"That where a suspicion arises from the nature of the questions, or from

(a) 3 Bar. 1514; S. C., 1 Wm. Bl. 510.

"contrary affidavits, the Court will examine into the *ground* upon M. T. 1866.
 "which the delay is asked." Here no cause of suspicion appears. *Exchequer.*
 There is every probability that these witnesses will be here in rea-
 sonable time for the trial at the sittings after next Term; and we *MURPHY*
 must hold, upon these affidavits, that grounds exist for alleging that *v.*
 they are material for the defence. *FIELDING.*

Motion granted.

JACK v. NOBLE.*

Nov. 7.
 H. V. 1867.
 Feb. 9.

MARTIN moved in this case that the plaintiff, who resided out of the jurisdiction of the Court, might be ordered to give security for costs.

The preliminary notice for security for costs, under the 52nd General Order 1854, must be served at least twenty-four hours before the service of the notice of motion, and no order will be made for security for costs if this has not been done.

W. Ryan, for plaintiff, took a preliminary objection, that under the 52nd General Order 1852,† the preliminary notice should be served twenty-four hours before the notice of motion, which had not been done; and submitted that this was a condition precedent; and that if the General Order was construed to mean that the preliminary notice should be served twenty-four hours before the motion was moved, then the preliminary notice might not be served until the day after the notice of motion, as the latter is a two-day notice.

Martin, in reply.

The practice is often to serve them together; I apprehend that

* Before the Full Court.

† 52nd General Order 1852:—"Where a defendant, served with a summons and plaint, shall require security for costs from the plaintiff, he shall be at liberty to apply by notice to the plaintiff for such security; and in case the plaintiff shall not, within twenty-four hours after service thereof, undertake by notice to comply therewith, the defendant shall be at liberty to apply to the Court, or a Judge, for such security by motion on notice grounded upon affidavit."

- M. T. 1866. all that is requisite is that twenty-four hours should elapse between the service of the preliminary notice and the moving of the motion. It might affect the question of costs, but that is all. The Court may dispense with the service of the preliminary notice altogether under special circumstances, and usually there is no affidavit of service of it.

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Cur. adv. vult.

PIGOT, C. B.

- H. V. 1867. We are all of opinion that the objection is fatal. We think it clear, upon the terms of the 52nd General Order, that twenty-four hours ought to elapse between the service of the preliminary notice and the service of the notice of motion. It is unnecessary to determine whether or not the affidavit upon which the motion is made should state the service of the preliminary notice and the failure of the plaintiff to comply with what it requires; or whether that may sufficiently appear to the Court upon the other documents. All that we are called upon to decide, and all that we do decide, is, that twenty-four hours must intervene between the service of the preliminary notice and the service of the notice of motion for an order to give security for costs. The terms of the 52nd General Order are.—[The LORD CHIEF BARON here read the 52nd General Order.]—Such being the terms of the Order, it would be senseless to hold that it shall be sufficient that the notice requiring security for costs shall be served twenty-four hours before the motion shall be moved. If that were so, since every notice of motion must be served two clear days previously to the motion being made, the notice of motion might be served first, and the notice requiring security might be served the day after, provided only it were served twenty-four hours before the motion were moveable, or perhaps (if this construction were adopted) before it were actually made; that is, the notice of motion might be served a day before any right existed to make the motion. That would appear to me directly to contravene the 52nd Order. The Order gives liberty to apply, only "where the defendant shall require security for costs from the plaintiff," and only "*in case* the plaintiff shall not, within twenty-four hours after the service thereof" (that is, of the preliminary

Feb. 9.

notice), "undertake by notice to comply therewith." The service of the notice requiring the security, and the non-compliance with what it requires, are essential to confer upon the defendant the right to make the application. If we should hold that the notice of motion under the 52nd Order may be served before the right to make the motion has arisen, we should determine what would lead to inconvenient results in practice. No hardship can be imposed by a strict compliance with the terms and spirit of the Order. But the relaxed construction of it, for which the defendant contends, would expose suitors to needless expense, by tempting practitioners first to delay giving the notice requiring security for costs, and then to file affidavits in support of a motion, before the time for answering the notice has expired. The costs of these, if the preliminary notice be complied with, must be a useless expense, since they could never be recovered from the opposite party; who, on his side, may be involved in uncertainty and expense, in reference to a pending motion which he renders useless by a compliance with the preliminary notice.

H. V. 1867.

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FITZGERALD, HUGHES, and DEASY, BB., concurred.

No rule on the motion.

J. HODGENS v. H. H. POE.*

M. T. 1866.

Nov. 22, 23.

This was an action for assault and false imprisonment, and was tried at the last After-sittings in this Court. At the trial it appeared that the defendant, being a Justice of the Peace, was present at

A warrant of committal for trial stated "J. P., of N.," as complainant, and

"W. K., J. H., and J. S.," as defendants, recited a complaint against the said defendants, and then proceeded, "This is to command you, &c., to lodge the said _____, of N., in the gaol of N.," &c.

Held, that this warrant was no defence to an action for false imprisonment by J. H. against the Justice who signed the warrant.

* Before the Full Court.

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 v.
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divine service at the parish church of Nenagh, when a disturbance took place, caused, it was alleged, by the plaintiff; and the defendant was requested by the churchwardens to interfere; and the defendant thereupon took the plaintiff into custody, and detained him, to examine into the offence, and to receive the informations of the officiating clergyman and others. These informations having been made, and the plaintiff not having entered into the sureties required by the statute, defendant duly made his warrant, and committed plaintiff to gaol until he should find sureties. At the trial the following warrant was produced:—

“Petty Sessions (Ireland) Act 1851—14 & 15 *Vic.*, c. 93.

“*Form Eb—Warrant to commit (or detain) for trial.*

“James Jocelyn Poe, one of the Churchwardens of the parish of Nenagh,	} Complainant.	{ Petty Sessions District of Nenagh.
“William King, John Hodgins, and John Smith,		
	} Defendants.	{ County of Tipperary.

“Whereas a complaint was made, on the 8th of January 1865, “on the oath of two credible witnesses, that the defendants did, “on this day, at Nenagh, in said county, disquiet and disturb a “congregation assembled for public worship in St. Mary’s church, “in the town and parish of Nenagh aforesaid.”

“This is to command you to whom this warrant is addressed “to lodge the said ———, of Nenagh, in the gaol of Nenagh, in “said county of Tipperary, there to be imprisoned by the keeper “of the said gaol, as follows:—

“Until they shall find two sureties to be bound by recognizance “in the penal sum of £50, late Irish currency, being equivalent to “the sum of £46. 3s. 1d., British currency, to appear and take their “trial at the next General or Quarter Sessions for the said county, “for the said offence; and for this the present warrant shall be “a sufficient authority to all whom it may concern.”

“To Head Constable James Long,
 of Nenagh.

Signed—HENRY H. POE,
 Justice of said county.

“Dated this 8th Jan. 1865.”

Counsel for the plaintiff asked for a direction, on the ground that this warrant was illegal. The Judge refused such direction, but

told the jury, if they found for the plaintiff, to assess damages separately for the two alleged imprisonments of the plaintiffs—one prior to, and the other subsequent to the warrant of committal. The jury found for the plaintiff for £5, on the supposition that the warrant was legal, and £5 for the further imprisonment, on the supposition that the warrant was illegal. The Judge directed a verdict to be entered for £5, with liberty to move to have it increased by £5.

The plaintiff, having obtained a conditional order, pursuant to the leave reserved—

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Macdonogh now showed cause.

The simple question is, whether this warrant of committal is void or not, because the names are not in the body. This is a warrant to detain for trial—not to punish. Here, however, the names of the parties against whom complaint has been made are stated in the beginning of the warrant; then the warrant goes on—"this is to authorise you to lodge the said" blank; but "the said" amounts to the insertion of the defendants' names. It could not be to lodge the complainant, against whom no complaint was recited.—[FITZGERALD, B. The complainants are mentioned as of Nenagh, and the defendants are not so described; and the warrant is to lodge "the said" of Nenagh. That must be the complainants.]—But it is to take his trial for the said offence; no one is charged with an offence except the defendants. The recital explains the offence as at Nenagh.—[DEASY, B. And the complainant is not of Nenagh; he is churchwarden of Nenagh.]—The whole context unavoidably tends to the conclusion that the warrant is to take the defendants into custody.—[FITZGERALD, B. Would this warrant be held a sufficient answer on a return to a writ of *habeas corpus*?]—Warrants of this kind are not to be scrutinised as warrants on final process: *Lev. Justice of Peace*, p. 106. The Court will not discharge, even where the committal is bad, if it is a committal for safe custody. They will call for the informations, and then determine what is to be done: *Chit. Criminal Law*, pp. 111 and 115. Even where

M. T. 1866. the committal has been held to be void, yet, being for trial, and not for safe custody, an action will not lie against the gaoler: *Prince v. Nicholson* (a). The third principle I rely on is the old maxim, *Verba illata inesse videntur*—*Broom's Leg. Max.*, p. 647. Many cases establish this principle, so far that you may, as in the case of wills, incorporate any number of other documents; but here you need not go out of the document itself.—[PIGOT, C. B. *Burns' Justice of the Peace* states that the warrant should contain the name and surname of the party.]

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Lover (with him *Dowse*).

In *Rex v. Gourlay* (b) Lord Tenterden says that the warrant in that case "is not to receive the same strict construction" as a warrant in execution; but the reason he gives is, that it is not a commitment for safe custody, in order that the party may afterwards be brought to trial. Nor is it a commitment in execution; but it is a commitment for safe custody, in order to secure the party, and prevent mischief to her Majesty's subjects. In *Rex v. Hood* (c) the prisoner killed the officer who proceeded to arrest him under a warrant; and he was held only guilty of manslaughter, because the warrant was informal. This case shows the importance of framing a warrant in the regular form.—[PIGOT, C. B. The object of the form is this, that the officer may know whom to arrest, and that the person who is arrested may know that he is the person against whom the warrant issued.]—*Fletcher v. Calthorp* (d); *Rex v. Bartlett* (e). You cannot make out an offence by force of intendment: *Money v. Leach* (f); *Shaddock v. Clipson* (g); *Rex v. Cooper* (h); *In re Tordoft* (i); *Vanderburgh v. Spooner* (k); *Hoye v. Bush* (l). *Howson v. Barrow* (m) shows how much particularity is required where the liberty of the

(a) 5 Taunt. 333.

(c) 1 Moo. Cr. C. 281.

(e) 12 Law Jour., M. C. 127.

(g) 8 East, 328.

(i) B. & S. 17.

(l) 1 M. & G. 775.

(b) 7 B. & Cr. 669.

(d) B. & S. 223.

(f) 1 Wm. Bl. 561.

(h) 6 T. R. 509.

(k) 1 L. R., Exch. 316.

(m) 6 T. R. 122.

subject is concerned: *Boyd v. Durand* (a). *Rex v. Hazell* (b) M. T. 1866. shows that no intendment will be made in favour of a warrant. That was certainly a warrant in execution. *Butler v. Bianconi* (c) *Exchequer.* shows what particularity is required in the processes of inferior *HODGENS* jurisdiction. *In re Byrne* (d); *Rex v. Horne* (e); *Dalton's J. P.*, c. 117, p. 329; *Regina v. Galvin* (f); *Regina v. Pelham* (g); 1 *Hale's Pl. Cr.*, p. 577. *POE.*

Dowse.

This warrant is framed in pursuance of the form Eb in the schedule to the Petty Sessions Act. Its exact extent must be set out in the warrant. The complaint is made against the three defendants; and if this warrant is good for anything, the whole three not only may, but must be taken into custody. These parties might have been admitted to bail. Suppose one of them admitted to bail, and the other two were not, and the warrant was drawn up in this form, then the constable might have taken the whole three into custody.—[DEASY, B. Yes; for the constable is only to read it, not to construe it.—PIGOT, C. B. Certainly, the introduction of two or three names, or of one name, would be perfectly consistent with the title.]—Suppose, again, one gave bail, and then he was arrested, and he brought his action, then the defendant might come in and say, "I did not order the arrest of that man:" *Paley on Conv.*, p. 276; *Chit. Cr. Law*, p. 110; 1 *Burns' J.*, p. 776.

Ryan, in reply.

The real question is, do the names of the parties appear in this warrant or not?—[PIGOT, C. B. The very circumstance of our having this argument is a strong presumption against you. Is the constable to go through a process of reasoning of this kind?]
Rex v. Elderton (h) shows that there is a distinction as to the way in which the Court will deal with a warrant for safe

(a) 2 Taunt. 161.

(b) 13 East, 139.

(c) 11 Ir. Law Rep. 286.

(d) 11 Ir. Law Rep. 538.

(e) Cowp. 672.

(f) 16 Ir. Com. Law Rep. 452.

(g) 2 Cox, Cr. C. 17.

(h) 6 Mod. 88.

M. T. 1866. custody and a warrant for punishment. It is said that the warrant
Exchequer. might apply to one of the defendants who had given bail, and that
HODGENS the Justice might have intended to commit him also; but the
v. presumption that an officer of justice will do right, ousts that
FOE. supposition.

PIGOT, C. B.

Nov. 23. My Brothers and I are agreed that there is no need of letting this case stand for any further consideration. For myself I may say that my opinion has fluctuated in the course of the argument. At first, and before I closely inspected the documents, I was disposed to give weight to Mr. *Macdonogh's* argument, that "said" referred to the previous antecedents, and comprised all the defendants; and that, upon the principle *verba illata inesse videntur*, we might treat the warrant as sufficient. On looking more carefully into the terms of the document, I find it impossible so to hold. Irrespectively of the authorities cited by Mr. *Lover*, and upon a consideration of the provisions of the Act of Parliament, and of the functions which constables have to discharge under warrants of this nature, I have come to the conclusion that this warrant cannot be sustained.

It is of the utmost importance not only that an instrument of this kind shall be intelligible upon the face of it, and shall be capable of being easily understood by educated persons, but that it shall be so intelligible that, without any minute inspection, its import may be at once comprehended by persons not possessed of any superior amount of knowledge and intelligence. Such a warrant is directed for execution to a class of persons not having a higher degree of education, or familiarity with legal forms other than those in ordinary use. It is intended to be executed by officers of inferior rank, who are often of inferior intelligence. Not only do such documents require great clearness, perhaps more clearness, than other legal instruments, with reference to the class of persons who are to execute them. They deal, moreover, with a class of persons often still less informed and less intelligent, namely, those against whom they are directed—persons very frequently in humble life, and of various habits and temperaments. The Petty Sessions Act, I think, had two main

objects in view in providing forms of these warrants—first, that the officer should know at once what is his duty when he has to make an arrest; secondly, that the person against whom the warrant is issued should know whether he ought at once to obey it. The books are full of instances in which ambiguity in warrants has led to the most calamitous consequences. These are results specially to be guarded against in that state of agitation and excitement which is very frequently produced by the execution of a warrant to arrest. If the warrant be clear in its terms, the person whom it is sought to arrest under it will be disposed to yield immediate obedience, rather than hazard resistance. Those are indeed general reasons which, irrespective of any particular enactments of the Legislature, indicate the importance of having warrants of commitment framed in terms plain and clear; and the statute provides for accomplishing this purpose most effectively by its terms, and that in the plainest and clearest manner. Not only in its enacting parts does it prescribe the duties of the various functionaries, but it provides, as helps to justice, those forms and examples which show how the statute is to be applied. It is of the utmost moment that we should not encourage any departure from those forms, unless that departure is sanctioned by the Act of Parliament. Now, the 36th section of the Petty Sessions Act provides for the use of these forms:—"In all proceedings under this Act the several forms in the schedule to this Act contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law, and shall be the proper forms to be used, even in cases in which other and different special forms shall be, or shall have been provided by the particular Act or Acts under which the information and complaint shall be made; but no departure from any of the said first mentioned forms, or omission of any of the particulars required thereby, or use of any other words than those indicated in such forms, shall vitiate or make void the proceeding or matter to which the same shall relate, *if the form used be otherwise sufficient in substance and effect, and the words used clearly express the intention of the person who shall use the same.*" In this instance there is no form provided by any other Act. Is the form used here

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M. T. 1866. "sufficient in substance and effect"? Does it "clearly express the intention of the person who" used it? In *Hale's Pleas of the Crown*, p. 577, it is laid down, "It is necessary that such warrant express the name of the party to be taken." The argument of the defendant is, that this warrant does contain the name of the plaintiff by reference. Why is it not inserted in the body of the warrant? Why is it left to reference? It is said that it was omitted by accident. But the term "accident," so applied, is only another name for neglect; and it is essential to guard against carelessness in framing instruments of this kind. In the present instance such carelessness is shown in one of the most important parts of the warrant. Is there a blank or not in this warrant? The law always discourages blank forms. A warrant so framed affords a temptation to a passionate or ill-informed man to resist its execution. Such warrants are not always deliberately executed; they are frequently executed after warm pursuit, and under circumstances of great excitement and haste in the pursuer and the pursued. It is of great importance that the name should be clearly shown upon the face of the warrant, so that he who runs may read. We should not leave such a matter to be made the subject of study, and of the collation of words, in order, by the help of the legal maxim "*verba illata inesse videntur*," to make sense of that which, upon the face of the instrument, is at least obscure. In the case now before us, arguments of great length and ingenuity were found necessary to suggest a mode of interpreting the words used, in the absence of the words omitted, in this warrant. Can we say that it would be safe to engage the persons who have to act upon such warrants in such discussions as these? Upon the consideration of the words most favourable to the defendant, the word "said" is still ambiguous. It is still doubtful whether it relates to all or some of those mentioned on the margin, or to whom specially it applies. The operative part would apparently be complied with if a plurality of two only of the three defendants were committed. Such a form cannot be treated as "sufficient in substance and effect," and as "clearly expressing the intention of the person who shall use the same," within the 34th section of the Petty Sessions Act. It appears to be bad at Common Law, and not warranted by this Act of Parliament.

Exchequer.
HODGENS
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M. T. 1866.
Exchequer.

KENNEDY v. KELLY.*

Nov. 10.

THE plaintiff in this case claimed the sum of £44. 4s. 3d. "on account of money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant." "And on account of money found to be due from the defendant to the plaintiff on accounts stated between them." To this the defendant pleaded, "that no money was owing from the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant as alleged; and that no money was found to be due."

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Litton, in reply, cited *Cock v. Mahony* (c).—[FROST, C. B. *Martin v. M'Hugh* is a case different from the present one. There there was a bill of particulars which admitted certain payments, and the plaintiff went on to claim for a balance. The defendant took defence as to a particular matter, and denied the contract as to that.—FITZGERALD, B. It would be open to them, under this defence, to prove that no debt ever arose, because the goods were delivered in accord and satisfaction of an antecedent debt.]—*M'Mahon*. No; not where I say "sold and delivered."

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(b) 6 Ir. Jur., N. S. 279.

(c) 3 Ir. Com. Law Rep. 240.

* Before the Full Court.

M. T. 1866. *James Greene (amicus Curiae)* referred to the dictum of the
Eschequer.
 LORD CHIEF BARON in *Dunsandle v. Finney* (a).
 KENNEDY
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 KELLY. PIGOT, C. B.

There are certain forms of pleading well known to the Profession; and any departure from those forms is, *prima facie*, an objection to a pleading. In England the general issue still exists; and a defence, such as is here in question, might come within it. But in this country we have no rule which expounds the meaning of defences of that character. In England, general rules limit the application of certain general pleas, giving them such a construction that they import a traverse of certain matters only. One reason why we have no such rule here is, that the Common Law Procedure Act, partly by its terms, partly by the construction given to it in our Courts, requires that the particular point of defence relied on shall be specified in the pleading. Accordingly, we have held that defences amounting to what was formerly understood as the general issue are objectionable.

This defence is open to two objections. First, it is ambiguous, as to whether it amounts to a statement that the defendant *never* was indebted, or to a statement that *at the time of action brought* he was not indebted. That he was not indebted at the time of action brought would have been consistent with a variety of circumstances, to be shown by specific defences. If this defence means the first, it is too large. But if it means that no debt was due at the time of action brought, then it is pregnant with an admission that a cause of action once subsisted; and it does not show that that cause of action has been discharged.

Nothing is more simple than the usual form in which a pleading for the purpose of presenting the defence relied on in this action is framed. According to my recollection, there was some controversy shortly after the passing of the Common Law Procedure Act, whether, in an action for goods sold and delivered, it was not necessary to traverse the delivery of the goods, and also the sale. I believe that, upon consideration, we came to the conclusion that it

(a) 10 Ir. Com. Law Rep. 171.

would create no ambiguity, and would cause no inconsistency with the statute, to allow the defendant to incorporate in his defence a denial of the state of facts upon which the plaintiff's case was rested. Accordingly, we have been in the habit of sanctioning, for a considerable time, defences denying both the sale and the delivery of the goods, pleaded to a count for goods sold and delivered. Any departure from the ordinary form of defence ought to be discouraged; and, in my opinion, it ought not to be allowed, unless the defence, in a different form, can be sustained upon very clear and cogent reasons. Suspicion must always attach to a new method of pleading, needlessly adopted, instead of a common and well-known form.*

M. T. 1866.
Exchequer.
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FITZGERALD, HUGHES, and DEASY, BB., concurred.

* Appended are some of the cases in which this matter has been canvassed. In the two first of the following cases, the Court of Exchequer, and two of the Judges of the Court of Common Pleas, appear to have formed similar opinions, without any knowledge in one Court of the opinion and reasons of the other.—See *Mosely v. M'Mullen* (6 Ir. Com. Law Rep. 69); *Executors of Boake v. M'Cracken* (*ibid.* 259); *Martini v. Roe* (6 Ir. Jur., O. S. 244); *Dalzell v. Walker* (*ibid.* 271; S. C., 3 Ir. Com. Law Rep. 581); *Crasson v. Johnston* (8 Ir. Com. Law Rep., App. xlv.); *Sing v. Cosgrave* (6 Ir. Jur., O. S. 283); and see *Meade v. Morrow* (4 Ir. Com. Law Rep. 284); *Kelly v. Duffy* (7 Ir. Com. Law Rep. 36); *Russell v. Nelson* (3 Ir. Com. Law Rep. 229); *Fitzgibbon v. Nagle* (10 Ir. Com. Law Rep., App. xxxv).

M. T. 1865.
Common Pleas.

LEE and WIFE v. PATRICK HAYES.*

(Common Pleas.)

Nov. 7, 8, 25.

DEMURRER.—In this case the action was brought by John Lee and Catherine his wife; and the writ of summons and plaint complained that the defendant was indebted to the plaintiffs in the sum of £100, “for that, on the 28th day of February 1862, and whilst the plaintiff Catherine Lee was unmarried, the defendant, by his promissory note, now over due, promised to pay to the plaintiff Catherine £100, twelve months after date, but did not pay the same.” “And for money payable by the defendant to the plaintiffs, for therefore void. The plaintiffs replied, upon equitable grounds, that the plaintiff the husband had married before the note became due, upon the faith that it would be duly paid, and without notice of the fraud. To two other counts upon accounts stated and settled before and since plaintiff’s intermarriage respectively, the defendant pleaded that the accounts therein mentioned were stated concerning the promissory note in the first count mentioned, and not otherwise.

Held, on cross demurrers to the replication, and to the second and third defences, that—

1—Where a document is referred to in a plea, the Court will look at it, and treat it as incorporated in the plea.

2—The fact that a plea purports to be pleaded on equitable grounds does not prevent the Court from treating it as a legal plea, in case it be found to amount to one.

3—The note was void *ab initio*, upon grounds of public policy, and was not set up by the mere fact of the marriage of the payee before its maturity.

4—The rule as to indorsement for value without notice is confined to cases where the security is in fact indorsed for value.

5—The second and third defences are bad, because the mere reference in them to the promissory note in the writ of summons and plaint mentioned does not incorporate the allegations contained in the first defence.

Semble—If the first defence had been unsustainable at *Law*, the equities being equal, the legal right to recover upon the note would have turned the scale in favour of the plaintiffs.

Semble—An equitable replication, which goes to show that the right to sue is only an equitable one, is bad.

Semble—In a Court of Equity the plaintiffs would fail, because the equities being in other respects equal, the defendant’s equity would be preferred, as prior in point of time.—*Rice v. Rice* (2 Drew. 77–8)

Quare—Can fraud upon a marriage contract be pleaded at law to an action upon a bond?

Roberts v. Roberts (3 P. Wms. 65) discussed.

* *Coram* MONAHAN, C. J., KEOGH, and CHRISTIAN, JJ.

"money found to be due from the defendant to the said plaintiff
 "Catherine, whilst she was unmarried, upon accounts then stated
 "between them."

M. T. 1865.
Common Pleas

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 v.
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"And for money payable by the defendant to the plaintiffs,
 "for money found to be due from the defendant to the plaintiffs,
 "on accounts stated between the defendant and the plaintiffs,
 "since their intermarriage, in respect of moneys payable by the
 "defendant to the said plaintiff Catherine whilst she was unmarried."

To this the defendant Patrick Hayes pleaded:—"For a defence
 "on equitable grounds to the first count of the summons and plaint,
 "the defendant says, that before the solemnization of marriage
 "then intended, and shortly afterwards solemnized, between the
 "defendant and one Ellen Tuomy; and after the execution of a
 "certain indenture of marriage settlement, dated the 20th of Feb-
 "ruary 1862, and made and duly executed between and by
 "Catherine Hayes widow, and Catherine Hayes daughter of the
 "said Catherine Hayes, now Catherine Lee the plaintiff, and David
 "Hayes, son of the said Catherine Hayes, of the first part, and John
 "Tuomy and the said Ellen Tuomy, his daughter, of the second
 "part, and the said defendant Patrick Hayes of the third part,
 "after reciting, amongst other things, the then intended marriage,
 "and that upon the treaty therefor it was proposed by the said John
 "Tuomy to give his daughter a marriage portion of £550, payable
 "as thereafter mentioned, in consideration of the parties thereto of
 "the first part respectively giving up all their respective rights,
 "title, and interest in and to the farm and lands of Ashgrove, and
 "certain stock thereon, to which they were entitled as in the said
 "indenture mentioned, to which the said parties had agreed;—it
 "was witnessed, that in consideration of said sum of £550, payable
 "as therein mentioned, and of the then intended marriage, the
 "said parties thereto of the first part did, according to their re-
 "spective rights, convey and assure unto the defendant Patrick
 "Hayes all their right, title, and interest in and to the said farm of
 "Ashgrove, and the stock thereon; the said promissory note was,
 "by the defendant, made and delivered to the plaintiff Catherine, to
 "secure to her the payment of £100, which the plaintiff had, before
 "the execution of the said indenture, promised to pay to the said

M. T. 1866. *Eschequer.*
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"sufficient in substance and effect"? Does it "clearly express the intention of the person who" used it? In *Hale's Pleas of the Crown*, p. 577, it is laid down, "It is necessary that such warrant express the name of the party to be taken." The argument of the defendant is, that this warrant does contain the name of the plaintiff by reference. Why is it not inserted in the body of the warrant? Why is it left to reference? It is said that it was omitted by accident. But the term "accident," so applied, is only another name for neglect; and it is essential to guard against carelessness in framing instruments of this kind. In the present instance such carelessness is shown in one of the most important parts of the warrant. Is there a blank or not in this warrant? The law always discourages blank forms. A warrant so framed affords a temptation to a passionate or ill-informed man to resist its execution. Such warrants are not always deliberately executed; they are frequently executed after warm pursuit, and under circumstances of great excitement and haste in the pursuer and the pursued. It is of great importance that the name should be clearly shown upon the face of the warrant, so that he who runs may read. We should not leave such a matter to be made the subject of study, and of the collation of words, in order, by the help of the legal maxim "*verba illata inesse videntur*," to make sense of that which, upon the face of the instrument, is at least obscure. In the case now before us, arguments of great length and ingenuity were found necessary to suggest a mode of interpreting the words used, in the absence of the words omitted, in this warrant. Can we say that it would be safe to engage the persons who have to act upon such warrants in such discussions as these? Upon the consideration of the words most favourable to the defendant, the word "said" is still ambiguous. It is still doubtful whether it relates to all or some of those mentioned on the margin, or to whom specially it applies. The operative part would apparently be complied with if a plurality of two only of the three defendants were committed. Such a form cannot be treated as "sufficient in substance and effect," and as "clearly expressing the intention of the person who shall use the same," within the 34th section of the Petty Sessions Act. It appears to be bad at Common Law, and not warranted by this Act of Parliament.

M. T. 1866.
Exchequer.

KENNEDY v. KELLY.*

Nov. 10.

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M. T. 1866. *Eschequer.*
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Exchequer.

KENNEDY v. KELLY.*

Nov. 10.

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M. T. 1865.
Common Pleas.

LEE,
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HAYES.

they may, if they think it advisable, amend the summons and plaint by stating the note to have been payable to order. To this the defendant has pleaded, on equitable grounds, that "before the solemnization of the marriage," &c.—[His Lordship here read the whole of the first defence.]—By way of equitable replication to this defence the plaintiffs say that the plaintiff John married the plaintiff Catherine before the promissory note became due, and upon the faith that the same would be duly paid, and without notice of the facts relied on in said defence, or that said promissory note was made in fraud of the said John Tuomy or Ellen Tuomy, or of the indenture of marriage settlement, as in the said equitable defence mentioned. To this replication a demurrer is taken; and the question now for us to determine is, whether, under the circumstances appearing in the pleadings, the plaintiffs are entitled to maintain an action against the defendant upon the promissory note? The principal argument for the plaintiff was substantially this, that the husband, who was the substantial plaintiff, had married his wife upon the faith of this being a valid promissory note; that he has at least as good an equity to insist on the payment of it as the defendant to resist its payment: and, though Catherine could not maintain the action before her marriage, that the same reason does not now apply, and there is no reason why her husband, who is in the nature of a purchaser of the note for value, should not be able to maintain it.

We were referred, in the course of the argument, to the case of *Roberts v. Roberts (a)*. The circumstances of that case were these: On the occasion of the execution of the marriage settlement of a son, to which the father was a granting party, a power was reserved to the father to jointure any second wife that he might marry, upon condition that he should pay a sum of £1000 sterling to the son, and the instrument was so framed as to make this a condition precedent to enabling him to exercise the power of jointuring. The father was about getting married; the lady's friends objected that he was not in a position to make a sufficient settlement if he were to be obliged to pay this £1000 to the son; and, finally, it was arranged that the

father should be allowed by the son to exercise the power of appointment without paying the £1000, and in pursuance of this arrangement the son executed to the father a release of the £1000. This was the agreement known to the intended wife's friends; but, unknown to them, the father executed to the son a bond for the amount. After some time the bond was about being put in suit, and the father, together with his wife, filed a bill for the purpose of having the proceedings stayed, and being released from liability on the bond. That was the case of a *bond*, and it was assumed that the father had no defence at law to an action on the bond. The father's Counsel insisted that the obtaining of the bond by the son from the father was a fraud on the father and his settlement. Counsel for the son, on the other hand, contended that the release obtained by the father from the son was as much a fraud on the son's wife and her family as the execution of the bond was on the father's family, and that the Court should not restrain the proceedings against the father. The Master of the Rolls was of that opinion; holding that there was no difference between their equities, and that the law should be allowed to take its course, and refused to give the father any relief.

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We were also referred to the case of *Rice v. Rice* (a). In that case a vendor of a small real estate executed to the purchaser the ordinary conveyance, with a receipt for the purchase-money indorsed. The purchase-money was not in fact paid, but was promised to be paid in a few days. The purchaser, immediately after the date of the conveyance to him, borrowed a sum of money, by deposit of the conveyance, the lender having become in fact equitable mortgagee, but not having obtained a conveyance of the legal estate. The vendor filed a bill to have the unpaid purchase-money raised by a sale of the estate, the purchaser, and also the equitable mortgagee, being parties defendants. The fund being insufficient to pay the amount of the mortgage, and of the unpaid purchase-money, the question arose—which of the two was entitled to priority; the unpaid vendor insisting that both demands being equitable,

(a) 2 Drew. 96.

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his, being prior in point of time, was entitled to precedence over the mortgagee's. The Court, however, held that the rule *qui prior est tempore, potior est jure*, applies only where the equities are quite equal, and that inasmuch as the vendor, by giving a receipt for the unpaid purchase-money, was guilty of negligence, and thereby had enabled the purchaser to obtain the advance from the mortgagee, and that as the mortgagee had made the advance *bona fide* without notice, and had not been guilty of any neglect or default, he had a superior equity, and therefore was entitled to be paid in priority of the unpaid vendor. If, in the present case, we were of opinion that the defendant had no defence at law to the action on the promissory note, we should attentively consider the application of those cases to which I have referred, and determine whether the equities of the plaintiffs or defendant were superior; and possibly we should come to the conclusion that the equity of the plaintiff John was at least equal to that of the defendant, he having married the plaintiff Catherine on the faith of her being entitled to the amount of the note in question, notwithstanding the fraud in the original making of the note. But it occurs to us that the question does not arise, and that we need not express any very decided opinion on the subject, if the defence of the defendant, though pleaded as an equitable defence—in fact constitutes a legal defence—to the action. In considering this question, it should, in the first instance, be considered as if the plaintiff Catherine was still unmarried, and had brought the present action for the amount of the note. It is quite clear that, to an action on a note, it is a good defence to plead that there was no consideration, or a fraudulent one. The cases which occur to me at the moment most like the present are those in which a debtor, who is compounding with his creditors, makes a private agreement with one of them to pay him in full, and gives a promissory note to secure the surplus beyond the proportion paid to the other creditors. It has frequently been decided that no action can be maintained on such a note by the immediate parties thereto. I cannot distinguish the case of an action by the plaintiff Catherine alone from the cases to which I have alluded; and, therefore, if the

ntiff Catherine were the sole plaintiff, it appears clear that the on could not be maintained. If this be so, the question then es, are the two plaintiffs in a better situation than the plaintiff berine would have been if she sued alone? It will be recol- ed, it is not alleged that the plaintiff John became indorsee of note before or after marriage; his title is, that his rights ued by act of law—that is, marriage. But I am not aware any principle or authority tending to prove that an assignee ct of law takes property, real or personal, in any better plight ondition than the party from whom he took it. I am not aware if property in the possession of an unmarried woman is subject any trust, or bound by any equity, that her husband, who uires his title by marriage, is not subject to all the equities ich his wife was before marriage; but, when we consider the are of the property in question, namely, a negociable security, case of *Whistler v. Forster* (a) seems an authority almost in nt. It was an action on a cheque, drawn by the defendant, able to A. S. Griffith & Co., or order, and obtained by Griffith m the defendant under circumstances which admittedly would re prevented Griffith maintaining the action; then Griffith gave : cheque to the plaintiff for value, and without notice, but uted to indorse it. Some few days after, the plaintiff had tice of the fraudulent circumstances under which Griffith ob- ned the cheque, and then got Griffith to indorse it to him. The estion was, could plaintiff maintain the action, as he admittedly uld, if he had been an indorsee for value without notice? The urt was of opinion that the rule as to indorsees for value without tice was strictly confined to cases in which the security was in ct indorsed for value without notice, and did not extend to any her description of transfer; and that, though the plaintiff had come the purchaser of the cheque or bill, without notice of the aud by which it had been obtained from the defendant, still, as : had this notice before the bill or cheque was indorsed to him, at he was in no better position than his indorser, and could not

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(a) 14 C. B., N. S. 248.

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therefore maintain the action. So, in the present case, for the reasons I have stated, I do not think the plaintiff Catherine could maintain the action before her marriage; nor can the plaintiff John, he being assignee by act of law—that is, marriage—and not by indorsement for value without notice. There must therefore be judgment for the defendant on the first count; but, with respect to the second and third counts on accounts stated with the plaintiff Catherine before her marriage, and with both plaintiffs since their marriage, the pleas are, that the accounting in the counts mentioned was on foot of the promissory note in the first count, and not otherwise; but there is nothing whatever to incorporate with these defences the facts specially pleaded to the first count; so that, if issue were taken on these defences, they would be sustained if the accounting was on foot of the note in the first count, though there was in fact no foundation for the allegations contained in the plea to the first count.

We must therefore allow the demurrer to the pleas to the second and third counts; the result of which will be, that the defendant will have judgment on the count on the promissory note, and plaintiffs on the other two.

KROGH, J., concurred.

CHRISTIAN, J.

I am of the same opinion; but, as regards the first count, wish to be understood as resting my judgment solely on Mr. *Dowse's* second proposition, namely, that the defence is good as a *legal* defence. If it could only be sustained as an equitable defence, which is the form in which it was pleaded, I shall say no more than that I should find it extremely difficult to distinguish the case from that of *Roberts v. Roberts (a)*, cited by Mr. *Daniel*, because taking as true, as of course we must, the averments in the replication, the contingency there set up is similar, and probably equal to that asserted in the plea; and if so, the legal estate or interest in the contract sued on would turn the balance in the plaintiffs' favour. But of course that

element vanishes if the defence be a good legal defence, because then there is no legal contract. Is then the defence a good legal one? If it be, its being pleaded as an equitable one does not prevent the defendant relying on it as a legal one. Well, upon that question I consider the case the same in principle as those decided on creditors' composition deeds, of which *Cockshott v. Bennett* (a) may be taken as the representative. In that case, fraud in the purpose for which the note was given—fraud on third persons—was held to afford a good defence at law, and, as it seems to me, quite in accordance with legal principle; because a promissory note being only a simple contract, anything which went to show illegality in the consideration went to show that it was *nudum pactum*, and therefore void at law. *Roberts v. Roberts* differs by being the case of a bond, which we know is good at law without consideration, and, though fraud on a marriage contract may at Law be sufficient to destroy the consideration of a simple contract, and in Equity to set aside a deed, it could hardly be pleadable at law to an action on a deed. Therefore, in *Roberts v. Roberts* the legal interest in the bond subsisted, and turned the scale between the contending equities. But the force of the defence here is to show that the note sued on is void at Law as well as in Equity, as being *nudum pactum*, or something even worse.

The defence then being good as a legal defence, there remains the question whether it is answered by the replication? That question is also twofold.—First; is the replication a good legal replication? I think not; for I know neither authority nor principle which would warrant the Court in holding that when a *feme sole* who has a promissory note void at law as between her and the maker, marries without indorsing the note, even though before it is due, her husband, or, more properly, she and her husband in her right, can maintain an action upon it, though she could not have done so while sole;—thus assimilating the position of the husband and wife to that of ordinary indorsees for value, and without notice before dishonour. I agree entirely in what the CHIEF JUSTICE

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(a) 2 T. R. 763.

M. T. 1865. has said upon that. But, secondly; if the replication be not a good legal, is it a good equitable replication? To this there are two objections.—First; an equitable replication, which goes to show that the plaintiffs' right of suit is only an equitable one, is bad; to be good it should sustain the legal cause of suit put forward in the plaint. Secondly; even if we were in a Court of Equity, as the plea is not only good at law, but contains an equity which is, to say the least of it, equal to that relied on in the replication, while it is prior in time, and, as the priorities are in all other respects equal (there being no legal estate), the case would be precisely one for application of the maxim *qui prior est tempore, potior est jure*, as that maxim is explained in the judgment of Vice-Chancellor Kindersley in the case of *Rice v. Rice* (a).

The conditions of the question are therefore wholly altered by treating the defence as a legal one, and altered in a way fatal in my opinion to the plaintiffs' case.

(a) 2 Drew. 77-8.

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v.

JAMES M'CORMICK and WILLIAM COWAN.*

(Queen's Bench.)

Nov. 15, 16.

THIS was a motion that the two defendants, prisoners confined in the gaol of Belfast on a charge of having formed part of a riotous mob unlawfully assembled with fire-arms, and who fired at a contending mob called "the navvies," be admitted to bail.

The prisoners were arrested on the 12th of September 1864; committed for trial on the 14th of the same month; and each of them subsequently caused an application on his behalf to be made to a Resident Magistrate in Belfast to admit him out on bail. Both applications were refused.

The prisoners were committed for trial on the depositions of four persons, each of whom testified against both the defendants. The material portions of those depositions were the following:—

Jane M'Nally, in an information on the 10th of September, having described how, in the afternoon of the 17th of August 1864, in the town of Belfast, she had seen a mob run into Smith's Dock, where the navvies were; how the navvies chased the mob out again; and how the mob crossed to the dock again, and split into two parties, one of which passed through Nelson-street; stated:—
 "At this time I saw fire-arms with the mob that came through Nelson-street. I saw three men armed come out from the mob, and kneel down on one knee. They aimed for the docks. I know those three men, James M'Cormick, who had a gun, John Dickson, who had a pistol, and William Cowan, who had a pistol. M'Cormick fired down on the navvies who were in the dock. I shouted to Dickson 'Murder, Dickson. You are our own neighbour, for God's sake don't fire.' He then turned round

Where the depositions make out a *prima facie* case of felony against the prisoners, and show a state of things which indicates that the prisoners enjoy a large amount of sympathy and support from the public, the Court will not be influenced, on an application to admit to bail, by the fact that the prisoners are able and ready to procure bail.

(HAYES, J., *dissentiente*).

* Before the Full Court.

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 M'CORMICK. "and fired at me: I was about twenty yards from him. I saw
 "Cowan fire down on the men in the dock at the same time as
 "M'Cormick. Soon after I saw M'Cormick going to fire secondly.
 "The gun would not go off; and I said, 'She won't go off for
 "you: I hope she will shoot yourself.' He then went into the mob;
 "and in a minute or so came out from the mob, crossed the road,
 "and again fired into the dock where the navvies were. The mob
 "then rushed into the dock, and smashed the windows of the office;
 "and the navvies ran towards the water."

In a deposition made on a subsequent day, this witness said:—
 "I now identify James M'Cormick and William Cowan as two of
 "the men referred to in the information. I have known both men
 "for the last two years; I have no doubt they are the men; they
 "live near me; I might be mistaken; but I am sure I am not; I
 "swear positively they are the men referred to in my information
 "made on the 10th inst."

On cross-examination, she said:—"I saw James M'Cormick
 "charge a gun, and *ram her*, at the corner of Nelson-street and
 "Dock-street; his clothes were soiled; he wore a dark cap and
 "moleskin trousers, not clean. Will Cowan was dressed in a white
 "linen jacket, and dark cap, and dirty trousers."

Deposition of John Keys:—"I recollect the day I was hunted at
 "the New Docks in Belfast, where I was working; I saw a mob
 "coming towards where I was working. There were about sixty
 "men working on the docks with me. The mob was large; they
 "came into the dock where I was working. A pistol was fired by
 "some one in the mob; two or three pistols were fired by the party
 "in the dock; and the mob ran away towards the foundry, where
 "they stayed for some time till they were reinforced, and returned
 "towards the docks, and fired. In that mob I saw a man named
 "James M'Cormick, who is now present, fire twice with a gun
 "amongst the men I was with. I wrought with M'Cormick on the
 "island, and know him well."

On cross-examination this witness described M'Cormick's dress
 as "a whitish jacket and trousers, and a dark cap."

Deposition of Ellen M'Killen:—"About half-past three o'clock I

"went to the corner of White-street, to see if the mob were gone,
 "when I saw another lot of men in a piece of waste ground near
 "Corry's saw-mill. It was a larger mob than the first. A good
 "many of that mob were armed with fire-arms, hatchets, and a foot-
 "adze. I saw some people in that mob that I knew: I saw William
 "Cowan. He had a pistol in his hand; I saw him fire it off in the
 "direction of the navvies, who were running away at the time. I
 "see William Cowan here now; and I identify him as the man
 "whom I saw in the mob on the 17th of August, and having a
 "pistol, which he fired off. At that time I did not know his Chris-
 "tian name. I also saw a man named M'Cormick in that mob; he
 "was running before them; he had a gun in his hand. I saw him
 "fire off the gun in the direction of the navvies. I see him here
 "now. I did not know his Christian-name at that time; but I
 "have heard since it is 'James.' In about half an hour after I saw
 "Cowan discharge the pistol, I went across to the railway gate
 "where he was standing, and said to him, 'It is a shame for
 "'you who has trades to be chasing them men that could scarcely
 "'keep themselves.' I told him I saw him shooting at the navvies;
 "and he said, 'You are very clever to tell me so.' Two men,
 "named Magrath and Magee, were present at this conversation.
 "Magrath said he had no pistol; and I said to Magrath, 'If you
 "'were doing your duty you would take him with you.' In ten
 "minutes I saw Cowan hand a pistol to Magee, who fired it in the
 "air over his head. From the time that I said to Magrath if he
 "were doing his duty he would take Cowan with him, until I saw
 "Cowan hand the pistol to Magee, I did not lose sight of Cowan.
 "Mrs. M'Nally was also present at this conversation. I heard
 "Mrs. M'Nally say to James M'Cormick, who is now present,
 "'Your gun would not go off to shoot the navvies; hell and it
 "may shoot yourself.' I heard say also, 'Dickson, murder, don't
 "take an aim, don't shoot.' At the time M'Cormick was on
 "his knee going to fire, Magrath ran a piece, and said to him,
 "'Murder, murder, don't take an aim.'"

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On cross-examination she added:—"Cowan had a white linen
 "jacket; but it was soiled, as if he had been working in it; he had

M. T. 1864. "some sort of a dark cloth cap, and whitish trousers. The n
Queen's Bench "was in the waste ground, about thirty yards from where I sta
 THE QUEEN "There might have been eight or nine hundred people in the crow
 v. M'CORMICK. "when they were all there; for it was dreadful. M'Cormick h
 "on a whitish soiled jacket and trousers, and a dark cap."

Patrick Treanor deposed:—"I saw a mob of about forty be
 "and men at the New Docks, Belfast, a little after three o'clock
 "that day. The mob afterwards increased largely. I saw the
 "have guns, bludgeons, foot-adzes, and something like bayonets.
 "saw shots fired at the navvies who were in the dock, where d
 "mob of forty men first assembled. The navvies were at the
 "work in the dock. I saw three men separated from the mob a
 "the end of the new street at the New Dock, firing at the navvies
 "each of the three men had a gun. I see a man, whose name I
 "believe is James M'Cormick, now present. I identify him as one
 "of the three men who fired a gun at the navvies five or six times.
 "I saw M'Cormick load his gun, and cross the road, and take aim,
 "and fire into the docks."

This witness, being cross-examined, stated:—"M'Cormick wore
 "that day a white trousers and a *brown* coat."

Each of the prisoners filed an affidavit to support the motion:
 that of M'Cormick, who described himself as an apprentice in the
 iron shipbuilding trade, aged twenty-seven years, contained (*inter
 alia*) the following material statements:—"I positively swear that
 "I did not fire the shots alleged, and that it is not true that I
 "had a gun, and knelt down, and fired shots into the docks, as
 "alleged in said depositions and informations; or that I fired into
 "the docks at all; that I never was in a Magistrate's or other
 "Court in my life until brought up on the present charge, and
 "never was summoned for, or charged with any offence or breach
 "of the law; and can get good characters from my employers,
 "Messrs. Harland & Wolfe, the extensive iron shipbuilders in Bel-
 "fast, and their managers and foremen, and the clergymen of my
 "church, and W. H. Waugh, Esq., of Sion Hill, near Dromore,
 "in the county of Down, a gentleman of considerable property and
 "means, and to whom I was well known previous to my coming to

"Belfast, and who is willing to enter into security for me to any
 "amount the Court may reasonably require. . . . That I
 "am, and ever since my arrest have been quite ready, and willing,
 "and desirous to take my trial, and was most anxious to be tried
 "at the late Quarter Sessions for the county of Antrim; and have
 "several most respectable witnesses, who are ready and willing
 "to come forward and give evidence on my behalf, but who were
 "not examined by the Magistrate taking the informations and com-
 "mitting me, although several of them were in Court;
 "that I am dependent on my wages, as such apprentice, for my
 "support, and out of which I have to assist in the support of my
 "widowed mother; that, if admitted to bail, I can pro-
 "cure good, solvent, and substantial securities for my appearance at
 "the Assizes, or other gaol delivery, in the sum of £50; that the
 "ordinary clothes worn by myself and fellow workmen, to the
 "number of several hundreds, whilst at our work, are white jackets
 "and moleskin or linen trousers, which of course become discoloured
 "and soiled."

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Cowan, a millwright, aged thirty-one years, in his affidavit swore
 positively that he did not take any part in the riotous proceedings
 referred to in the informations and depositions; that he had not a
 pistol in his hands or possession that day; and that he did not fire
 a pistol, as alleged in said informations and depositions, or any other
 fire-arm; and that he came off his work after the rioting had been
 going on, but did not go down or approach to where it was going on.
 He, too, swore that he had never been in a Magistrate's Court, &c.;
 that he was never charged with any breach of the law, and could
 get good characters from Messrs. Harland & Wolfe, &c.; that he was
 and had been ever since his arrest quite ready, willing, and desirous
 to take his trial, &c. (as in the affidavit of M'Cormick); that he was
 dependent on his earnings for the support of himself, his wife, and
 two children; and that, if admitted to bail, he could get solvent
 securities in the sum of £50.

Whiteside (with whom was *Falkner*) moved that the prisoners
 be admitted to bail. They might have been tried at the Quarter

M. T. 1864. Sessions; and in *Fitzpatrick's case* (a) the prisoner was admitted to bail, because "as yet there was no prosecution, and a Sessions was past." So, in *Lord Aylesbury's case* (b), the prisoner was admitted to bail, because "his trial had been delayed." Prisoners should be admitted to bail in every case not a capital one: *Marriott's case* (c); *Baronet's case* (d); *Barthelemy's case* (e); *The Queen v. Badger* (f); *Linford v. Fitzroy* (g).—[FITZGERALD, J. In committing the prisoners, to what tribunal did the Justices send them?]
 THE QUEEN v. M'CORMICK. To the Assizes; so that they will be imprisoned from September 1864 to March 1865, although their families depend for subsistence on their earnings.

Serjeant *Sullivan* and *Waters*, for the Crown, resisted the application.

The informations and depositions show that the prisoners joined in an assemblage of persons who deliberately knelt down and fired on the navvies. That is a felony, punishable with penal servitude for life, under the 24 & 25 Vic., c. 100, s. 18. It is not the rule that bail should be taken in every case short of capital punishment: *The Queen v. Scaife* (h); *The Queen v. Gallagher* (i); *The Queen v. Sealy* (k); *The Queen v. M'Cartie* (l).

Falkner.

The question is, whether the prisoners, if admitted to bail, will be forthcoming at the Assizes to take their trial? Prisoners are sometimes kept in prison for many months (which is in itself a failure of justice), because if they are admitted to bail there will be a still greater failure of justice, and the prisoners escape punishment altogether. These prisoners took no part in the riots until it became necessary for them to protect their wives and children.

(a) 1 Salk. 103.

(c) 1 Salk. 104.

(e) 1 EL. & BL. 8.

(g) 13 Q. B. 240.

(i) 7 Ir. Com. Law Rep. 19.

(b) 1 Salk. 103.

(d) 1 EL. & BL. 1.

(f) 4 Q. B. 468.

(h) 9 Dowl. Pr. C. C. 553.

(k) 7 Ir. Com. Law Rep. 92.

(l) 11 Ir. Com. Law Rep. 188.

The punishment in this case, even if a conviction is obtained, will not necessarily be penal servitude for life, inasmuch as the Judge may sentence them to only three years of it. In *The Queen v. Gallagher* (a) it appears that there was a wide-spread conspiracy, and there was a likelihood that a subscription would be made up to remove the prisoners from the country; and *The Queen v. M'Cartie* (b) was a case of treason-felony. *Baronet's case* (c) was a case of murder; but the present was only a case of one mob firing on another mob; it was not an instance of individual passion, but an offence of human nature. The prisoners were only mistaken men; and the highest punishment would not be inflicted.

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Cur. adv. vult.

FITZGERALD, J.

In this case an application, to be admitted to bail, was made yesterday on the part of James M'Cormick and William Cowan, who, as appears from the affidavits and informations, were committed for trial in the month of September last, by the Justices of Belfast, on a charge arising out of the recent outrages of which that town was the scene. In any observations which I may make, I do not intend in any manner to indicate any opinion as to the guilt or innocence of the prisoners. They are to be tried by the constitutional tribunal of the country, a jury, and the less we say to prejudice the case on the one side or the other the better. But, for the purpose of disposing of this motion, we must, in the first instance, assume the informations and depositions to be accurate, unless something appears to induce the Court to think that the parties who made the informations are not entitled to belief, or have committed a mistake; affidavits have been made in support of the application by the prisoners, but a negative affidavit made by the prisoner himself is generally entitled to very little weight or consideration; and it is generally better to dispose of such an application on the depositions and informations alone.

Nov. 10.

The case made on the depositions—I have not had them before

(a) 7 Ir. Com. Law Rep. 19. (b) 11 Ir. Com. Law Rep. 188.

(c) 1 El. & Bl. 1.

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M'CORMICK. me, but they were read yesterday, and I speak from my recollection of them,—was, that the parties before us are charged with being ringleaders of a mob on one side,—and when I say “ringleaders” I mean that they are described in the depositions as having singled themselves out from the mob; both of them were armed with fire-arms, and one at least of them, on two or three occasions, is represented as having discharged a loaded gun towards the body of navvies assembled in the dockyard; and if the deponents are worthy of belief, no one can doubt but that the acts of the prisoners were, under the circumstances, done with the intent to kill, or to at least maim or disable, or to do grievous bodily harm. The prisoners were committed on this charge, and the Justices refused to admit them to bail; and now, on this application the Law Officers of the Crown, in the exercise of their discretion, come in to oppose the discharge of the prisoners on bail, resting their opposition, I assume, on the legal ground that if they are admitted to bail there is danger that the prisoners would not be forthcoming to take their trial at the Assizes.

I may observe that, if the witnesses who have made the depositions are entitled to be believed, and the facts are not displaced, there is a cogent and persuasive case to call on the jury to find the prisoners guilty of firing with intent to kill or do grievous bodily harm.

Several of the authorities to which we were referred had very little to do with this case; but we were pressed very much with *The Queen v. Scaife (a)*, where that calm and clear-minded Judge, Mr. Justice Coleridge, stated the considerations upon which the judgment in bail-motions should be based—namely, whether the offence charged is a serious one; whether the punishment to which the criminal, if convicted, would be liable is considerable; and whether the evidence is strongly presumptive of guilt,—and then whether there is reason to apprehend that if the prisoner was discharged on bail he would not appear at the trial to answer for his offence.

In the present case the first consideration is, whether the offence

(a) 9 Dowl. Pr. Cas. 553.

is a serious one, nay more, I should use the expression employed by Mr. *Falkner* yesterday,—whether the offence is one of enormity; and I can only say that, in my judgment, supposing the case against the prisoners to be made out, it is an offence of great enormity. We cannot shut our eyes to this fact, that during the continuance of these lawless outrages—I pause not to consider whence they originated or who was first or most to blame—the town of Belfast was for some days in the hands of infuriated mobs; neither life nor property was secure; the law of the land and the Queen's authority were set at defiance, and several human lives were sacrificed. When, therefore, the charge against the prisoners is, that upon this occasion they singled themselves out as leaders of one mob, were armed with fire-arms, knelt down and deliberately took aim, and fired on the body of navvies assembled in the dockyard, the offence, if proved, is, in my opinion, one of great enormity.

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I proceed to consider the next proposition put by Mr. Justice Coleridge touching the nature of the evidence against the prisoners. My opinion is, that if the case on the part of the Crown is not answered at the trial, if the jury believe the witnesses, and if their testimony, as it appears in the depositions, is not displaced, there is clear evidence to warrant, nay, to call for, a conviction.

The third consideration relates to the nature of the punishment. There is, no doubt, a wide discretion in the Judge, to be exercised by him according to the circumstances of each particular case. I do not now suggest how it should or ought to be exercised in the cases now before us. But the prisoners are liable, on conviction, to a sentence of penal servitude for life.

Then is there reasonable ground to apprehend that the prisoners, if discharged on bail, may not be forthcoming to stand their trial? The Justices have refused to receive bail, and the Law Officers of the Crown, in the exercise of a discretion which I think is generally fairly and mercifully exercised, oppose the discharge of the prisoners on bail. It would be difficult then for the Court to see its way, and say that there is no apprehension that the prisoners, if they are admitted to bail, may not be forthcoming to take their trial. We cannot shut our eyes to this—that there has been a wide-

M. T. 1864. spread combination upon one side and the other, in Belfast, to set the law at defiance; and can I say now, with satisfaction to myself, that the prisoners, if likely to be convicted, and liable to a punishment so heavy as that which I have pointed out, will be forthcoming at the next Assizes to take their trial? I have alluded to what is apparent on the depositions, a wide-spread combination to set the law at defiance. The proposition is to bail the prisoners on their giving their personal security, each in a sum of £50, and the security of two sureties a-piece for £25 each. But where, as in the case of the sheep-stealers in Donegal, and in the case of the Phoenix prisoners, a wide-spread conspiracy appeared to exist, the Court took that element into their consideration on refusal to admit to bail. Where there is such combination, there is little difficulty in procuring bail with the aid of the conspirators, even though there be no intention that the prisoners shall appear at the trial.

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Upon the whole, I am unable to come to the conclusion that, having regard to the circumstances of these cases, there would not be a solid apprehension that the prisoners, if now discharged on bail, might not be forthcoming for trial; and upon that ground alone I think that we ought not to reverse the decision of the Justices.

HAYES, J., was of opinion that the application ought to be granted.

O'BRIEN, J.

I concur with my Brother FITZGERALD that the application of the prisoners James M'Cormick and William Cowan to be admitted to bail should be refused. The facts of the case have been fully stated, and the authorities which have been cited clearly show the principles upon which the Court should act on such applications. According to the judgment of Coleridge, J., in *Baronet's case* (a), there are three important matters for our consideration in determining whether we should admit a prisoner to bail, or detain him in custody in order to insure his appearance at the trial—namely, “the charge, the nature of the evidence by which it is supported, and

(a) 1 El. & Bl. 6.

‘the punishment to which the party would be liable if convicted.’ M. T. 1864.
 In the present case the offence charged against the prisoners by the *Queen's Bench*
 informations is, that of firing into an opposing crowd, with intent THE QUEEN
 either to kill or (at all events) with intent to maim, disable, or v.
 to do grievous bodily harm—a felony of a very serious character, and M'CORMICK.
 for which, if the prisoners be convicted, they might be sentenced not
 merely to imprisonment, but, at the discretion of the Judge who
 tries the case, to penal servitude, even for life. With respect to the
 evidence in support of this charge, the statements contained in the
 informations are abundantly sufficient for the purpose. It is true
 that those statements, so far as they fix guilt upon the prisoners, are
 contradicted by the affidavits filed on their behalf; but, in such
 a conflict of swearing, it is not our province, nor would it be ad-
 visable, to pronounce any opinion as to what would be the result of
 the trial,—whether credit would be given to the witnesses for the
 prosecution, or to those for the defence. It is enough, for the
 purposes of this motion, to say that if the statements in the infor-
 mations be true, they would conclusively establish the guilt of the
 prisoners, and that on the informations themselves there appears no
 ground for questioning their truth. It is also requisite (in conse-
 quence of the wide discretion vested in the Judge as to the
 punishment he might award in case of conviction) to consider
 whether the facts connected with the alleged offence render it of
 such an aggravated character as would call, if not for the severest
 punishment, at least for one of such severity that the apprehension
 of it might induce the prisoners not to appear for their trial; or
 whether there are those extenuating circumstances in the case
 which should reduce the punishment so far as that the apprehension
 of it would not prevent the prisoners from taking their trial.

It appears that, for some days before the 17th of August last,
 which was the date of the alleged offence, there had been disturb-
 ances of an outrageous character in Belfast—conflicts between two
 riotous mobs of different parties, who were armed with weapons of
 various descriptions, and had inflicted severe injuries, not only on
 each other, but on the persons and property of unoffending indi-
 viduals. It is difficult to imagine how these violent and scandalous

M. T. 1864. proceedings could have continued so long, in such a town as Belfast, if the authorities had taken proper measures to suppress them.

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THE QUEEN appears also that the prisoners belonged to one of those contending parties; and that the crowd into which the prisoners are stated to have fired was of the opposite party, consisting principally of navvies or dockmen. The affidavits filed for the prisoners state that, a couple of days before the 17th of August, the navvies had attacked houses, and committed various other violent outrages. It also appears that, in an earlier part of the 17th, several of the prisoners' party were proceeding to attack the dockmen, but were repulsed by them; that shots were fired by some of the dockmen, that the prisoners' party retreated, but in some time afterwards returned in greater numbers, several of them having fire-arms; and that then they fired upon the dockmen. It is positively sworn in several of the informations, that both the prisoners were with that party, and fired upon the dockmen; that the prisoner M'Cormick did so several times, kneeling down upon one occasion to take deliberate aim with his gun; and that the prisoner Cowan fired at the dockmen when they were actually running away. On this state of facts it has been suggested that, though the previous outrages committed by the dockmen did not justify the acts charged against the prisoners, they should at all events be considered as mitigating their guilt, and as a ground for not inflicting a severe punishment upon them. But whatever were the outrages previously committed by the dockmen (outrages for which they also would deserve exemplary punishment), it does not appear that the firing with which the prisoners are charged was at all necessary or requisite for self-defence, or that they were obliged for that purpose to take the law into their own hands. On the contrary, it appears from the informations that, at the time the prisoners fired, their party were in fact the assailants: and I cannot accede to the suggestion that this highly criminal act is to be excused on the ground of its being in retaliation for any previous outrages committed, not even on themselves, but on others of their party. The admission of such a principle would be dangerous to the public peace and safety, and would be altogether at variance with those principles which should

in every well-regulated community. I am, therefore, of opinion that the offence with which the prisoners are charged by informations is one for which (if proved against them) they should deserve a severe and not merely a moderate punishment; that, accordingly (having regard to the principle laid down in *Baronet's case* and others), it is expedient that they should be detained in custody, in order to insure their appearance at their trial.

We have been referred by prisoners' Counsel to several cases which, however, are materially different in their circumstances from the present. It is true that in *Fitzpatrick's case* (a), though the prisoner was committed on a charge of treason, in having aided the escape of another prisoner confined for high treason, he was admitted to bail; but it was upon the ground that there had been no prosecution, and that a Sessions had past. In *Lord Aylesbury's case* (b) also, the ground of the prisoner being admitted to bail (though charged with treason or felony) was stated to be, that he had been long in prison, that his trial had been delayed, and that his life was in danger. In the present case, however, there has been no delay, as no Assizes has intervened since the prisoners' commitment. In *Marriott's case* (c) the ground of the prisoner being admitted was, that the crime charged "*was only a great misdemeanour.*" In *The Queen v. Badger* (d) the Court merely decided that, where the crime with which the prisoner was charged was the use of seditious language at an unlawful assembly (which was only a misdemeanour), the prisoner was entitled as of right to be admitted to bail; and that the Magistrates acted erroneously in refusing the bail tendered, not because they objected to its sufficiency, but because the parties who were tendered as bail held the same political opinions as the prisoner, and had taken a part in similar proceedings. Again, in *Linford v. Fitzroy* (e), where the charge against the prisoner was also a misdemeanour (namely, an assault on a constable in the discharge of his duty), the only matter decided was, that the

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(a) 1 Salk. 103.

(b) 1 Salk. 103.

(c) 1 Salk. 104.

(d) 4 Q. B. 468.

(e) 13 Q. B. 240.

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Queen's Bench was a "*judicial duty*," and not merely ministerial; and that
 THE QUEEN accordingly an action against the Magistrate for refusing to take bail
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It will be seen that none of these cases govern the present. In some of them the prisoner was held entitled to bail, on the ground that there had been delay on the part of the prosecution; in others on the ground that the crime charged was only a misdemeanour; and with respect to this latter ground, the case of *The Queen v. Scaife (a)* would show that, in some cases, even of misdemeanour, bail might properly be refused. Another case, however, that of *The Queen v. Woods (b)*, was also relied on for the prisoners. In that case, it is true that, the prisoners, though apprehended on a Coroner's warrant, upon a charge of manslaughter, were admitted to bail by this Court; but it appears by the report of the case that, though the prisoners were of a party, some of whom had fire-arms, by the use of which death occurred, the prisoners themselves did not use or carry any arms: a circumstance which essentially distinguishes that case from the present one, in which it is stated by the informations that both the prisoners fired upon the opposite crowd; that one of them did so several times, and knelt down deliberately to take aim. Reference has also been made to the case of the Phoenix prisoners—*The Queen v. M'Cartie (c)*—where two classes of prisoners were confined on a charge of treason-felony, one class in the county Cork and the other in the county Kerry. Mr. Justice Perrin and myself held that the county Cork prisoners should be admitted to bail; but we did so on the ground that their trial had been postponed from the preceding Assizes, on the application of the Crown, as a matter of right on the part of the Crown, without assigning any reason for the postponement, and although it was opposed by the prisoners who were prepared, and desired, to take their trial. Our opinion in that case with respect to the Cork prisoners cannot, therefore, be relied on in support of the present application. And with respect to the Kerry prisoners, whose trial had been postponed from

(a) 9 Dowl. P. C. 553.

(b) 9 Ir. Law Rep. 71.

(c) 11 Ir. Com. Law Rep. 188.

the preceding Assizes *at their own request*, we concurred with the other Members of the Court in refusing to admit them to bail.

On these several grounds, I think that the present application should be refused. If the charge against the prisoners in the informations be untrue, I think that they will be acquitted; but (as I have already stated) we are to decide this motion on the supposition that the charge stated in the informations will be proved at the trial, there being nothing in the informations themselves to warrant a contrary conclusion.

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LEFROY, C. J.

In this case I agree with my Brothers O'BRIEN and FITZGERALD. They have already referred to the former cases in which I have laid down the principles and stated the grounds upon which I held the same doctrine on which I am now about to act; so that I am enabled to state shortly my view of the case. In the case of the sheep-stealers in the county of Donegal—*The Queen v. Gallagher (a)*—the great principle upon which the Court acted was, that the charge in that case involved a great public interest. It was a combination affecting the great body of the public in the place where the offence was committed; and does not the charge here concern the whole public in the town of Belfast? My Brother HAYES has gone fully through the documents, and brought before the Court the circumstance that this was a case in which the actors on both sides consisted of two furious mobs, acting towards each other in a way that exposed to immediate danger quiet and innocent parties, and placing the town of Belfast itself almost in a state of siege; for no man could go abroad without incurring danger, even though he did not join with either party. The case that was urged on the part of the prisoners fails signally when we come to look at the documents. The only case that was attempted to be argued was, that the proceedings of the prisoners were in self-defence. It was, however, by their own showing, anything but self-defence; for the acts of the other party, which they allege as the provocation, were done the

(a) 7 Ir. Com. Law Rep. 19.

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day before. Is it possible, in a state of civilization, where there are laws—where there exist means of obtaining retribution through the law—that parties shall be allowed to take into their own hands the exaction of retribution, and the measure of retribution, for wrongs done to them? In the island of New Zealand, or among the Red Indians in America, the injured parties may be allowed to obtain retribution for the wrongs they have suffered, by taking into their own hands the infliction of punishment on their adversaries; but I cannot see how such a state of things can be permitted in any civilized country. Are we then to be told that, when upon an examination of witnesses, upon evidence taken in the presence of those who now complain of being detained in custody, with an opportunity of judging the manner in which the testimony was given—which we have not had—and with an opportunity for the accused to administer any question they wished to their accusers, the Justices have (with all these facilities to enable them to come to a just conclusion) deliberately determined that these are not cases in which the prisoners should be admitted to bail,—are we, I say, to be told that we ought to reverse their decision? In my opinion we should greatly violate the principles upon which we have heretofore acted, and should continue to act, if in such a case we were to annul the decision of the Justices, and order these prisoners to be bailed. The circumstances of this case involve a great public principle. It is a case which should expose every man concerned in these outrages, on the one side and on the other, to the punishment due to an offence against the public; not merely against those who were individually engaged, but against the public; and, if we were to afford to such an offence the encouragement which would arise from making a rule discharging these prisoners upon bail, it seems to me that we should violate the duty which we owe to the public.

Therefore I clearly concur in the opinion delivered by my Brothers, who think that the prisoners should not be discharged from custody.

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25.

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MICHAEL MOYLAN v. JOHN NOLAN.*

THIS action was tried at the last Assizes for the county of Galway, before the Right Hon. Mr. Baron Deasy and a common jury.

In form the action was brought upon the common count for goods sold and delivered by the plaintiff to the defendant, to recover a sum of £118. 15s. 0d.; but substantially the plaintiff alleged that the goods were necessities supplied by him to the defendant's wife.

The plaintiff was a grocer and spirit dealer, residing in Summer-hill, Dublin; and the bill of particulars set forth his demand as follows:—

"1864, 4th March.	To amount of account, as rendered per pass-				
	book	...	...	...	£117 12 0
	By cash on account:	...	...	...	20 0 0
					£97 12 0

The balance of the plaintiff's demand, with the exception of a charge of £2. 1s. 0d. for interest, was for groceries, spirits, wine, and brandy—of which the items were stated in detail,—supplied during the months of March, April, and May 1864. Ten and one-half gallons of whiskey cost £9. 16s. 2d.; twenty-seven bottles of wine cost £4. 1s. 0d.; and one flask of brandy cost 5s. 6d.

The defence was a traverse of the sale and delivery as alleged.

The defendant, who is a builder in extensive business, had his workshops and place of business at No. 3 Meredith-place, in the neighbourhood of Summer-hill. Part of the defendant's family lived there; the remainder, amongst whom was Miss Bell, the defendant's sister-in-law, lived in another house of his in Amiens-

all necessities in cash. The Judge told the jury that a mere private arrangement would not be sufficient to rebut the presumption of the wife's agency. Verdict for the plaintiff.

On motion for a new trial, on the ground of verdict being against evidence, and misdirection—

Held. (O'BRIEN J. *dissentiente*)—That the direction was right.

On the question of evidence the Court was equally divided; LEFROY, C. J., and FITZGERALD, J., holding that there was no sufficient evidence to rebut the presumption. O'BRIEN and HAYES, JJ., entertaining a contrary opinion.

* Before the Full Court.

Action for goods sold and delivered.

Traverse.—At the trial it appeared that goods had been supplied to defendant's wife, and payments made by her on account; that a bill had been accepted by defendant's wife, and made payable at plaintiff's house, in order to conceal it from defendant; that the goods were supplied for the consumption of defendant's family, and consumed by them at his house, and with his knowledge; that he had never known of the dealings with plaintiff, or authorised dealing on account; that he had made his wife a weekly allowance for necessities, and had always paid for

M. T. 1864. street. All the goods, however, were delivered at No. 3 Meredith-
Queen's Bench place.

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From the evidence of the plaintiff himself it appeared that, on the 1st of June 1860, an account in his books was opened by Miss Bell in the defendant's name, and continued down to June 1864; that on that very day the plaintiff lent Mrs. Nolan a sum of £5, which was afterwards repaid, and credit given for the repayment; that the defendant's children ordered goods; that, in June 1862, the defendant's wife told the plaintiff to send the usual order every Saturday; that, up to May 1863, but not since then, a pass-book was kept in the defendant's name, who never, until June 1864, told the plaintiff not to supply goods; that the plaintiff had not since then supplied any; that he always dealt with the defendant's wife and family, but never went to the defendant himself; that the plaintiff received from time to time from Mrs. Nolan and Miss Bell various sums on account; that Mrs. Nolan never came to the plaintiff's establishment; but he went to Mrs. Nolan, who "was aware of the people coming to him for the goods;" that, in December 1863, the plaintiff drew a bill of exchange, payable on the 6th of March 1864, for £80, on Mrs. Nolan, who accepted it; that it was made payable *at the plaintiff's place, in order to conceal it from the defendant*; that the plaintiff himself retired that bill on the 8th of March 1864, about which day the defendant's son came to the plaintiff, saying that the Bank of Ireland runner was at the defendant's house, and that plaintiff would ruin Mrs. Nolan by such transactions; that the runner then came into plaintiff's house with the bill, which the plaintiff had not paid at that time, but has paid since the 6th of March 1864; that his books do not contain any entry of credit for that bill; that, at the beginning of March 1864, the sum of £119. 13s. 0d. was due to him; that he was then pressing Mrs. Nolan for payment, who knew that that was the amount due, promised to send him £20, and said that she would have cleared the account altogether only that she had to buy furniture for the house of her daughter, who had got married; that he got on three several days afterwards sums amounting to £20, for which he gave credit

in a bulk sum on the 4th of March; that on the 3rd of March 1864, Mrs. Nolan accepted in her own name (Jane Nolan) another bill of exchange, payable in three months, for £99. 13s. 3d., the balance remaining due after credit for the £20 had been given; that he got no further payments, though goods had been since supplied; that he would not have taken Mrs. Nolan's acceptance only she told him that she would have to leave the house if her husband knew she owed so much; and that the bill was signed unknown to the defendant.

The plaintiff's porter proved the delivery of the goods at No. 3 Meredith-place, the defendant's house.

On behalf of the defendant, a doctor proved that Mrs. Nolan's health was such that she could not with safety attend the trial.

The defendant himself deposed that he had been married twenty-six years, and had lived with his wife until within three weeks preceding the trial; that he had not ever authorised her or Miss Bell to open in his name any account with the plaintiff, whom he first saw on the 2nd of June 1864, and first spoke to on the 6th of that month; that he (the defendant) had not, until on the 2nd of June 1864 he received notice of the bill of exchange, ever heard of any such account; that no demand for any part of it was ever made on him; that he never heard his wife was running any bill, nor knew, until June 1864, of either the bill of December 1863, or that of March 1864; that he supplied her with £5, and sometimes more, a-week, which he considered a reasonable allowance, for the "inside economy" of the house, which did not include servants' wages, for which in addition Mrs. Nolan applied to him, while he himself paid rent, taxes, clothing, education, doctor's fees, coals and light, but left the discharging of the servants to her, and did not interfere with her management; that she never did business for him in his office except that, if a bill was coming due, he would leave her money to pay it; that he first saw the pass-book in the Amiens-street house, but not until the Saturday preceding the trial; that he never, until the day after he received notice of the bill, cautioned any person against trusting her; that he never asked her where she was dealing, but knew that the plaintiff's boy came to the house

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with things, and first knew in 1863 that she was dealing with the plaintiff; that he knew that she had been for years dealing at another establishment (Ryan's), but never knew that she had given it up; that more than eighteen months ago he observed on her signs of drink, which he attributed to natural causes; that he might have noticed those signs more than twice, but not more than six times; that she said then that her stomach was affected; that his brother-in-law and sister-in-law had lived with him for years; that his daughter had been married more than a year; that by the doctor's orders he generally took one glass of grog, never punch, after dinner, and another going to bed; that they very seldom had friends in the evening; and that his wife and two eldest sons used to take porter at dinner.

John Nolan, son of the defendant, deposed that he kept his father's bill-book, but knew nothing of the bill of December 1863, until the runner called at Meredith-place; that after the runner called he saw his mother, he went to plaintiff's, where he arrived before the runner; that he said to the plaintiff there *As a bill after coming below with my mother's name on it; that the plaintiff said:—"I know about that bill; I have been searching in the "different banks for that bill, as I did not wish it to be seen below; "but could not find it;"* that after the runner went away plaintiff handed the bill to witness, saying, "Master Nolan, this is yours;" and that he was very sorry it had caused Mrs. Nolan any trouble; and that he, witness, gave the bill to his mother, but never till then knew that she was getting goods on credit.

Miss Bell deposed that she did not know that Mrs. Nolan had a pass-book with the plaintiff, and had never heard of, or seen it till the Saturday preceding the trial; that witness did not open with the plaintiff an account on behalf of the defendant; nor know that Mrs. Nolan passed bills, nor whether she was paying the plaintiff, though she knew that Mrs. Nolan got £5 a-week, and dealt with the plaintiff without the defendant's knowledge.

Some other evidence having been given on behalf of the defendant, the plaintiff was recalled, and contradicted in some particulars the testimony of Miss Bell.

The learned Baron told the jury that, when husband and wife were living together, the wife was presumed by law to have authority to order goods suitable to the establishment for the supply of it; and that the husband was liable for goods so supplied on the wife's order; that that presumption was capable of being rebutted; *but that a mere private arrangement between husband and wife, not communicated or known to the party supplying the goods, would not of itself be sufficient to rebut it.*

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The learned Baron then left to the jury the question—whether the goods supplied by the plaintiff, or any of them, were so supplied upon the credit of the husband; or whether they were supplied upon the credit of the wife solely, with the knowledge or belief that she was acting without authority, and in hope that, either to avoid exposure or through the wife's influence, the husband might, unwillingly, be prevailed on to pay for them; and told them that, in the latter case the husband would not be liable, and that they should find a verdict for the defendant as to all goods which they might think were so supplied on the credit of the wife solely. The learned Baron called their attention to the transaction about the bills of exchange, as affording evidence that the plaintiff then at least knew the wife was getting goods without the husband's authority; and told them that, if they thought so, the plaintiff was not entitled to recover for the goods subsequently supplied; and that he was bound to give credit for the £20 paid by the wife, as against any goods previously supplied which they might think were supplied on the husband's credit; and that, even as to the goods previously supplied, these transactions, coupled with the absence of any communication with the defendant, afforded evidence, which was for their consideration, that the plaintiff believed the wife was acting without her husband's authority, and trusted her solely.

Counsel for the defendant then called on the learned Baron to tell the jury, that if they believed the evidence of the defendant, and that the money given to Mrs. Nolan was sufficient for the supply of the establishment, that that rebutted the presumption.

Counsel also required the learned Baron to tell the jury that, if they believed that the defendant only authorised the purchase of

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goods for ready money, and that the money supplied was sufficient for the purpose, they should find for the defendant irrespective of the plaintiff's knowledge. The learned Baron declined so to do.

The jury found for the plaintiff the amount of the goods supplied up to December 1863—viz., £80, and gave credit as against that amount for the £20 paid by the wife afterwards.

The learned Baron's report concluded with an expression of his opinion that, if his direction to the jury was right in point of law, their verdict was a right conclusion from the evidence.

Sidney, on behalf of the defendant, in this Term, obtained a conditional order to set aside that verdict, and for a new trial, on the grounds that the verdict was against evidence, against the weight of evidence, and that there was a misdirection.

Against that conditional order cause was shown by *Walter Bourke*, *P. J. Blake*, and *Monahan*.

The action has been brought to recover the price of goods sold and delivered, and the bill of particulars shows that the goods were such ordinary commodities as are usually bought for ordinary domestic consumption. Though technically the defence is a simple traverse, its real nature is—that the goods were sold and delivered by the plaintiff to the defendant's wife and by her directions; and though a wife is, generally speaking, her husband's agent for the purchase of, at all events, goods of that nature, yet that the defendant had in this instance countermanded her authority to do so on credit, and therefore is not liable. The defendant and his wife lived together; and the defendant's evidence only established a renunciation by him of his wife's authority, which renunciation, however, was not at any time communicated to the plaintiff.—[LEFROY, C. J. Had the defendant ever paid for goods which had been ordered solely by his wife?—There was no evidence of that. The learned Baron told the jury that the defendant was entitled to their verdict if the credit was exclusively given to his wife; and also that, if they thought that the credit was given

to the husband, then that the case made by him to repudiate his wife's agency did not amount to a legal repudiation of her authority, and that therefore they were at liberty to find for the plaintiff. They gave a verdict only for the price of the goods supplied *before* the bill transactions; and, if that verdict was a right conclusion from the evidence—and the learned Baron reports that in his opinion it was,—then arises the question, whether the instructions given to the jury were according to law? Supposing that the credit was given to the husband, there was not anything to absolve him from the responsibility so incurred by his wife. No doubt he gave her a sum of £5 per week with which to defray household expenses; but that circumstance does not excuse him, since he never cautioned her against running into debt, or told her that that sum must cover all the expenses of the internal economy of the house. And even if the defendant had prohibited his wife from pledging his credit, still the plaintiff cannot be bound by that uncommunicated private arrangement between husband and wife. Husband and wife are principal and agent, and the scope of the wife's authority is defined in *Freestone v. Butcher* (a), where Lord Abinger told the jury that "In the cases of orders given by the wife, in those departments of her husband's household *which she has under her control*, the jury may infer that the wife was the "agent of her husband, till the contrary appear." It was expressly proved in the present case, that the goods were supplied for those departments of the defendant's household with the management of which by his wife he never interfered. In *Read v. Legard* (b) it also appears that a wife may pledge her husband's credit for whatever commodities are *necessary* for the purposes of domestic management. Thence it is to be inferred that the wife's authority is that of an agent, the nature of which may be seen in *Chitty Cont.*, p. 322. When such a general agency exists, the public are not bound by a private understanding between the principal and the agent: *Russ. on Factors*, p. 75. The defendant will rely on *Manby v. Scott* (c), where the husband was held not to be liable.

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(a) 9 C. & P. 643.

(b) 6 Exch. Rep. 636.

(c) 1 Lev. 4; S. C., 2 Sm. L. Cas. 375.

M. T. 1864. But that case was held to be rightly decided, inasmuch as the goods there supplied were not necessities. The same principle formed the ground of the decisions in *Montague v. Benedict* (a), *Seaton v. Benedict* (b). That the wife's implied authority cannot be affected to the tradesman's prejudice, by any private arrangement of which he has not had notice, appears from *Johnston v. Sumner* (c). This case is not closed by the authority of *Jolly v. Rees* (d), because there the goods were obtained by the wife, not only without his authority, but contrary to his order.

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Sidney, with *M. Morris* and *W. Duggan*, in support of the conditional order, contended that the verdict was against evidence and the weight of evidence, and pointed out that many facts showed a design in the plaintiff and Mrs. Nolan to conceal the dealings from the defendant. Thence it was argued that the plaintiff had given credit to Mrs. Nolan; and Counsel then proceeded to show that the directions given by the learned Baron to the jury were erroneous in point of law. At the time of the trial, in July, the case of *Jolly v. Rees* was not known to the Profession.—[Fitz-GERALD, J. I suppose that *Johnston v. Sumner* was cited.]—It was, and the learned Baron couched his direction to the jury in almost the very words of the decision in that case; whereas the objection made on behalf of the defendant was put in the terms of the third resolution in the case of *Manby v. Scott* (e). That case remains the law to this day; and yet the direction amounted to this, that no private order by the husband to his wife to not deal on credit could affect the creditor's rights, if uncommunicated to him, nor was any question, touching the sufficiency of the funds given by the defendant to his wife, left to the jury. The implied presumption of agency was rebutted by the fact that the defendant kept his wife in funds wherewith to buy the commodities necessary for domestic consumption. In some cases it seems to have been taken

(a) 3 B. & C. 631; S. C., 2 Sm. L. Cas. 408.

(b) 5 Bing. 28; S. C., 2 Sm. L. Cas. 415.

(c) 3 H. & N. 261.

(d) 15 C. B., N. S. 628; S. C., 33 Law Jour., N. S., C. P. 177.

(e) 1 Lev. 4.

for granted that a wife has a greater authority to pledge her husband's credit than an ordinary agent has to pledge that of his principal. That notion has been exploded; for the recent decisions establish that a wife has, in her capacity of agent, no greater powers, privileges, or authorities, than belong to an ordinary agent; for instance, a servant who is supplied with money and sent to purchase any articles.—[FITZGERALD, J. The direction given to the jury may have been wrong, and yet your two objections may have been wrong also; because you did not ask that these circumstances—the sufficiency of the funds supplied to the defendant's wife, and her authority to pledge his credit,—should be left to the jury; but you called for a rigid direction in the defendant's favour.]—But the jury were misled by the manner in which the case was left to them. There exists no absolute necessity for an express prohibition of the master to his servant, or of a principal to his agent, forbidding the purchase of goods on credit. If a servant is sent to market with ready money the master is not liable if the servant buys on credit, even though no express directions not to buy on credit were given, nor was the vendor told that the servant was to deal for cash only. But if on the first occasion the servant is sent to deal with a tradesman on credit, and afterwards for ready money, and this last direction is not communicated to the tradesman, the master may be then liable if the servant pledges his credit. The allowance by the husband to his wife of a sufficient sum for the purchase of necessities rebutted the presumption of law, that the wife had authority to pledge his credit for them: *Renaux v. Teakle* (a).—[O'BRIEN, J. In that case, too, the question was left to the jury, whether the goods were suitable to the wife's station? and they found in the affirmative.]—That is so; and the observations of Martin, B., in that case show that the "question is one of agency," and that if the husband supplies his wife with money enough she cannot pledge his credit. An observation made by Pollock, C. B., in *Johnston v. Sumner* (b)—"that she has all the usual authorities of the wife, notwithstanding any private arrangement between the husband and wife,"—was a

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(a) 8 Exch. Rep. 680.

(b) 3 H. & N. 261.

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mere *dictum*, being entirely beside the question involved in that case; or it may mean a secret arrangement that she was to buy the goods without paying for them; and yet not pledge his credit.—[LEFROY, C. J. May not that case stand on the ground that importance must be attached, not to what a husband and wife arrange verbally between themselves, but to what acts they do? If the husband gives money to his wife, that is the thing which produces the effect, and not what they say.]—That is the substance of what Pollock, C. B., stated in the next sentence of his judgment, which shows that the *acts* of the husband are to be looked to.—[O'BRIEN, J. Taking together the different parts of that case it might be interpreted in this way—that, where no supply of money is given by a husband to his wife, there, no arrangement between them, nor any directions given by him to her to not pledge his credit, will avail to relieve him from responsibility; but that her agency ceases when he supplies her with sufficient money.]—In other words, he is excused from liability when his acts and words agree, but not when they are opposed to each other.

A new trial must be granted, since the jury were not asked both these questions—first, whether the goods were necessities suitable to the wife's station; and, secondly, whether she had any express or implied authority to bind her husband by the contract? *Read v. Teakle (a)*.—[FITZGERALD, J. Have you any case where, the necessities being supplied at the husband's house, and consumed there to his knowledge, he was nevertheless exempted from liability? That is my difficulty as to your objections.]—No such case has been found. The husband who gives money to his wife to buy necessities with, and partakes of them himself, is not liable if she has purchased them on credit, there being no circumstances which might undeceive him.—[FITZGERALD, J. The question is, whether the husband is bound to see that the money is properly applied; or whether the tradesman is to lose his goods by the wife's misapplication of the money?—Martin, B., laid it down that the whole question is one of authority. The moment that the *necessity* for the agent to deal on credit ceases, the principal's liability also

(a) 13 C. B. 629.

cases.—[FITZGERALD, J. The wife, by force of her conjugal position, is presumed to have a general authority to buy necessities. How that presumption is to be rebutted by the fact, uncommunicated to the tradesman, that her husband has given her money, is what I want to know?—The supply of money by the husband puts an end to the necessity: *Jolly v. Rees* (a) shows also that the case should be tried again, in order that the jury may determine whether the allowance made by the husband was sufficient? As the plaintiff took Mrs. Nolan's bill of exchange, the defendant was not even bound to prove that he had sufficiently supplied her with money: *Metcalf v. Shaw* (b).—[FITZGERALD, J. The case becomes very different when, as in *Metcalf v. Shaw*, there are circumstances to put on inquiry the party who gives the credit.]—But here, as there, the plaintiff acted wilfully and corruptly, and is almost estopped from demanding the amount from the husband, since he took the wife's bill. If the husband gives money enough, and the wife does not pay for the goods, the tradesman must take the consequences: *Etherington v. Parrott* (c); *Montague v. Benedict* (d).

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For the first time, the Court is called upon to establish the principle that whenever any married woman enters the shop of a tradesman who sells the ordinary necessities of an establishment which are partly consumed by her own husband, it will be the bounden duty of the tradesman, in order to protect himself against the consequences of matters which, unknown to him, have passed between the married woman and her husband, to assume that she is either a rogue or a spendthrift; because the tradesman is, according to the doctrine of the defendant, bound to ask her in the first instance—"Has your husband given or allowed you money for the purchase of these articles; or has he forbidden you to take credit?"—[FITZGERALD, J. He must go further, and ask that question of the husband, because the wife may tell a lie.—O'BRIEN, J. The present case is not exactly the case you put, for the dealings

(a) 15 C. B., N. S. 628.

(b) 3 Camp. 22.

(c) 1 Salk. 118.

(d) 3 B. & Cr. 631.

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here have been going on during two or three years.]—But if a man's wife cohabits with him she is, whether he will or no, his general agent by the law of the land.—[LEFROY, C. J. How far is she his general agent?—As far as is requisite for the procurement of those necessities which are usually left to her management.—[LEFROY, C. J. And then the other principle involved is, what will supersede that; and whether the fact of its having been superseded must be communicated to the tradesman?—Certainly; and the cardinal point in this case is that there was no such communication: *Ruddock v. Marsh* (a). A master, although he gives money to his servant to purchase the goods with, remains liable.—[FITZGERALD, J. Do you think that that case touches the present?—Yes; because Holt, C. J., says in it that it is "more reasonable" that the master "should suffer for the cheats of his servant than strangers and tradesmen."—[FITZGERALD, J. Recollect that there the goods had been ordered on credit by the express authority of the master, and there was evidence that he had given the servant money to pay for them.]—But the language of Holt, C. J., is very strong.—[FITZGERALD, J. In other words, you mean that the husband should not merely give the money, but see to its application.]—Certainly; if the husband trusts her entirely, why should the public doubt her? What passes in private between a principal and his general agent will not withdraw from the public the agent's authority to bind his principal. So the facts, that the husband supplied enough money, and privately arranged with his wife that she was not to deal on credit, will not withdraw from the public at large the wife's authority to bind her husband by contracts for necessities. Unquestionably the principal is liable for the acts of his general agent: *Nickson v. Brehon* (b). As in that case the master gave authority to the clerk, so here the law gives it to the wife; and it shows that if private arrangements were to affect the authority there would be an end to all dealings except with the husband himself: *Smedhurst v. Taylor* (c)—[O'BRIEN, J. Have you looked at the case of *Lane v. Ironmonger* (d)?—No.

(a) 1 H. & N. 601.

(b) 10 Mod. Rep. 109.

(c) 12 M. & W. 545.

(d) 13 M. & W. 368.

As long as husband and wife live together, the supply by the husband to the wife of a sufficient sum of money does not discharge the husband from his general liability: *Etherington v. Parrot* (a). The case of *Manby v. Scott* (b) does not rule this case, because there the husband and wife had been living apart; and that is a repudiation by the husband of her agency; it puts the public on inquiry. In *Montague v. Benedict* (c) the articles were not necessities; and in *Seaton v. Benedict* (d) there was money paid into Court, and moreover the nature of the goods showed that they were not supplied for ordinary domestic consumption, or partaken of by the husband, but were for the use of the wife alone. Again, in *Renaux v. Teakle* (e) there was concealment; the wife had worn the clothes only during her husband's absence. The observations of the Judges in that case were all mere *dicta*; and the decision is not satisfactory, for it does not appear whether it went upon the ground that admissible evidence had been excluded; or that the goods were not necessities; or upon the broad principle that the wife has an abstract right to bind her husband unless he expressly restricts it. In *Jolly v. Rees* (f) the tradesman did not even know whether the lady was a married woman, and he lived at a distance; whereas here the goods were purchased from a neighbour, with whom the defendant knew that his wife was dealing. If the thing comes to the use of the husband he is chargeable for it: *Year Book*, 27 Hen. 8, 25 a.

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FITZGERALD, J.

This case came before us on the 23rd and 24th of November last on a conditional order obtained by the defendant to set aside the verdict had for the plaintiff, on two grounds—first, misdirection; secondly, that the verdict was against the weight of evidence.

The cause was tried before Mr. Baron Deasy; and his report is so full, and the matters of fact were so amply discussed before

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(a) 1 Salk. 118; S. C., 1 Lord Ray. 1006.

(b) 1 Lev. 4.

(c) 3 B. & C. 631.

(d) 5 Bing. 28.

(e) 8 Exch. Rep. 680.

(f) 15 C. B., N. S. 628.

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us, that I propose to refer to them so far only as may be necessary for expressing my judgment on the question of law now raised.

The action was instituted to recover a sum of £118. 15s. 3d., for groceries, wine, spirits, and porter, supplied by plaintiff on the orders of the defendant's wife, and delivered at his house.

The plaintiff is a grocer; the defendant is a builder and contractor, carrying on business in Amiens-street, but having his dwelling-house in Meredith-place, where he resided with his wife and children, and other members of his household. The defendant's wife appears to have been the domestic manager of the establishment at Meredith-place, exercising the ordinary powers and duties of a wife in such a position. It appears that in 1860 she opened an account at the plaintiff's establishment, in the defendant's name; and she or her children, or other members of the household, ordered goods from time to time; and in June 1862 she directed the plaintiff "*to send the usual order every Saturday.*" The goods were sent to the house at Meredith-place, and were consumed there by the family, including the defendant himself; but though the defendant may have known that goods were supplied by plaintiff, he did not know they were supplied on credit. In December 1863, there being then £80 due, the plaintiff drew a bill on defendant's wife for the amount, payable at his own house, which she accepted, and which he took up. Payments to the amount of £20 were made after that date; and in March 1864, there being then £99. 13s. 3d. due, the plaintiff again drew on defendant's wife for the amount as before, and took it up at maturity. The plaintiff gave an explanation of the circumstances under which he took those bills; but, on the other hand, the taking of the bills, and the surrounding facts, were such as that the jury might from them have deduced the inference that the plaintiff gave the credit to defendant's wife alone, and so might have rejected the whole of the claim. The account ran on to June 1864, when the last bill fell due, of which the defendant became aware, and thereupon gave a cautionary notice.

The defendant's wife was not examined as a witness; her absence was accounted for on the plea of illness. The defendant was

examined; and his evidence in substance was as follows.—[His Lordship read the evidence.]

No question seems to have been raised at the trial, but that the goods were necessaries, and suitable to the household of the defendant. It did not appear that the defendant had actually prohibited his wife from buying on credit, or had given her any express direction not to exceed the £5 per week; nor was it alleged that she had misapplied any portion of it. It did not appear whether the £5 per week was given by the defendant to his wife in advance, or at the end of each week to pay up the accounts of the week. The direction given by the learned Judge to the jury was as follows.—[His Lordship read the direction.]—To which summing up of the learned Judge the defendant's Counsel took two exceptions, viz.—[His Lordship stated them.]—It may be thought that the Judge's direction was too general, and ought to have been more specific, and that the case suggests various topics to which the attention of the jury should have been specifically directed; but we must recollect that the Judge reports his charge very shortly, and only in relation to the objections taken on points of law; and no doubt the charge, if we had it in full before us, was comprehensive, specific, and free from any objections, save those urged. It would be dangerous to assume otherwise; for in practice a Judge at *Nisi Prius* takes a note of his charge or direction only so far as may be necessary to explain the objections taken to it. If any material topic is omitted, or not put before the jury with sufficient clearness, or if the charge is ambiguous, or on any other ground open to objection, it is the duty of the party to call the attention of the Judge to the alleged defect, at a time when it may be remedied. We must assume therefore the correctness of the direction, save in respect of the points noticed at the trial.

The objections put in by the defendant's Counsel apply only to that passage of the Judge's direction in which he informs the jury "that a mere private arrangement between husband and wife, not communicated or known to the party supplying the goods, would not of itself be sufficient to rebut it." The jury might on the Judge's direction have negatived the whole of the plaintiff's claim;

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but the verdict seems to have been well considered and discriminating. The jury disallowed all the plaintiff's claim which arose after the bill for £80 was drawn; and as against the £80 then due they gave the defendant the benefit of the subsequent payments.

I propose now to consider whether the portion of the Judge's direction to which the objections apply is correct in point of law.

The case was most fully and ably argued; the defendant, relying principally on the third resolution in *Manby v. Scott*, and on *Renaux v. Teakle*, *Reed v. Teakle*, and *Jolly v. Rees*. The plaintiff, on the contrary, resting his argument on *Marsh v. Ruddock*, *Hort v. Brien (a)*, and *Johnston v. Sumner*. The authorities were so fully commented on, and those relied on for defendant so clearly distinguished, by Mr. *Blake* in his able reply, that I propose to advert, but very shortly, to a few of them. The Judge's direction was probably founded on that portion of the judgment in *Johnston v. Sumner* in which the Chief Baron is reported as laying down that, "If a man and his wife live together, it matters not what private arrangement they may make, the wife has all the usual authorities of a wife." It was urged, on the part of the defendant, that the above *dictum* of the Chief Baron was not well founded, and that the contrary had been subsequently decided in *Jolly v. Rees*. The latter case was distinguished by Mr. *Blake*, in his argument, on substantial grounds; and it is to be borne in mind that Mr. Justice Byles differed in opinion from the other Members of the Court, and that *Jolly v. Rees* may possibly stand, and yet not govern the present case. I shall have occasion to advert to it again. The effect of the wife's contract, in imposing an obligation on the husband, depends on the authority which he has conferred on her, either expressly or by fair and reasonable implication. There was no express authority in the present case; and the first consideration is, whether the defendant's wife had authority to bind him, to be implied from her position, and the surrounding circumstances. Upon this question of implied authority there has been some apparent conflict in the cases; and it would not be a practicable task to

reconcile all the decisions on the subject. The fair result of the authorities seems to me to be, that where, as in the case now before us, a wife living with her husband in his house, and managing his household, gives orders for goods which are necessities, and not extravagant, and which are supplied at the husband's house, and there used, it will be presumed that she had a general authority from her husband to give such orders; and he will be bound by her contract, and liable to pay for the goods.

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I am not aware that, either in *Manby v. Scott*, or any of the other authorities cited, there is to be found any decision conflicting with the proposition I have now stated, and which is in substance the first portion of the direction of the learned Judge, and to which no objection has been taken. The Law of Scotland seems to agree with the Law of England in this respect. In *The Institutes of the Law of Scotland*, in treating of this subject, where the wife is *præposita negotiis* by the husband, it is said:—"With regard to disbursements necessary for a family, the rule is, that the wife, who is formed by nature for the management within doors, is presumed, while she remains in family with her husband, to be *præposita negotiis domesticis*. In this character she has power to purchase whatever is proper for the family; and the husband is liable for the price, even though what she purchased has been applied to other uses, or though he may have given the wife a sum of money *aliunde* sufficient for the family expenses."

It is to be observed, further, that in the present case the goods were actually delivered at the husband's house, and he and his family had the actual benefit of them, by consuming them, which are circumstances not to be disregarded, as appears from *Manby v. Scott* and other cases. In *Manby v. Scott* Foster and Wyndham, JJ., say:—"A *feme covert* cannot make any contract to bind her husband without his assent—precedent or subsequent, express or implied; they did not deny that, as circumstances may be, an express or implied assent of the husband may appear to a jury, so that the contract of the wife may be the contract of the husband, as if the goods came to his house." And, again, the third resolution in that case is:—"Thirdly; if the wife purchase

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 "yet the husband shall not be liable for them; *but it shall be good*
 "evidence for the jury to find that the husband assumpsit, but not
 "conclusive."

Assuming that, from the facts of cohabitation, and of the wife's administration of the household, a presumption arises of her general agency to procure a supply of necessaries, and of the husband's assent to her contracts, it remains to be seen whether that presumption can be rebutted by proof of such a private arrangement as existed in the present case, *but which was not communicated or known to the plaintiff*. It is to be borne in mind that the presumption of authority in the wife is of a general authority, though not unlimited or unrestrained—that is, an authority to act for her husband in all matters which come within the scope of her employment in the administration of the household. A special or particular authority, on the other hand, is an authority to act in some particular or individual instance, and in that alone. The distinction is one of substance and not of form, and necessary to be borne in mind, and is based on principles of public policy, and intended to prevent fraud on innocent persons. If a husband was suffered to permit his wife to act, and appear to the public as one having a general authority to act, as his representative in the management and administration of his household, it would lead to the grossest injustice if he was permitted to set up his private directions, of which the party dealing with her had no notice, as directing and controlling her apparent general authority. The law on this point seems to be correctly stated in *Story on Agency*, p. 100, and is consistent with natural justice and sound common sense. "If" (says Mr. Justice Story) "a person is held out to the public as having a general authority to act in a particular employment or capacity, it would be the height of injustice to permit the principal to set up his own private instructions to his agent, limiting that apparent authority, when the party dealing with him had, and could have had, no notice of the limitation." And Mr. Chancellor Kent observes that the acts of a general agent—that is, one whom a man puts in his place to transact his business of a particular kind—will bind him

so long as the agent keeps within the general scope of his authority, though he may act contrary to his private instructions. *Hort v. Fries* (a) supports this view. Bayley, J., there puts the very case, when he says:—"But, if he supplies her with a sufficient allowance for the purpose of paying for these necessary supplies, and if the tradesman with whom she deals *has notice of it*, and afterwards trusts her, he does so at his peril." As also the *dictum* of Bramwell, B., in *Ruddock v. Marsh* (b), where he says:—"People have a right to suppose that a wife keeping her husband's house has such authority as is usually given to a wife in that position. If the husband would limit the authority, he must give notice of the limitation."

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Referring again to the Law of Scotland, I find it stated that:—"This proposition ceaseth, first, by the wife's delict, as, if she should abandon her family; secondly, by the husband depriving her of the management of his family. As the wife's right of managing is founded entirely on the supposition that he placed her in the direction, and, as every one knows, may remove his managers at pleasure; so, the husband is not bound to offer any proof of "bad economy or profuseness, to justify that measure." And a note of a case is added, thus, "A husband, *who intimated to an innkeeper that he would not be liable* for contractions by his wife after a day named, was held liable only for *maintenance* to her suitable to his own means."

As against these authorities, the defendant relies principally on *Jolly v. Rees*. In that case the action was for drapery and millinery supplied to defendant's wife without his knowledge, not delivered at defendant's house; nor had he any knowledge of the transaction until the account was furnished. The defendant had not, as in this case, given to the wife the appearance of an authority to act for him as a general agent. Erle, C. J. says (c)—"In supporting this conclusion our decision does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he

(a) 4 B. & Ald. 254.

(b) 1 H. & N. 603.

(c) 15 C. B., N. S. 628, 640.

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"was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground." And the judgment of Byles, J., is precise in plaintiff's favour, his opinion being "that a private arrangement between husband and wife, limiting her ordinary and apparent authority, without notice to the tradesman who has supplied necessities to the wife," is no answer to an action of the tradesman against the husband. Defendant's circumstances are inapplicable to *Jolly v. Rees*, and it seems to me not to govern the present case.

It seems to me that in the present case it would be contrary to the principles of sound sense and of natural justice, and in conflict with the authorities, if the private arrangement between the defendant and his wife were permitted to defeat the rights of the plaintiff, who had dealt with her in ignorance of such arrangement.

Being, therefore, of opinion that the direction of the learned Judge was right, I have still to consider whether the verdict should be set aside as against the weight of evidence.

The case now presents itself as one of conflict of evidence, and peculiarly for the decision of a jury. There was on the plaintiff's part evidence of a sale of goods on the order of defendant's wife, she being *prima facie* his authorised agent, and of the delivery of those goods at defendant's house, and their consumption by defendant and his family; while, on the other hand, there were circumstances connected with the transaction sufficient to have warranted the jury in finding that the plaintiff had given credit to the wife alone; or in deducing the inference from the nature of the dealings and the surrounding facts, that the plaintiff was put on his guard, and knew, or ought to have perceived, that the defendant's wife was not acting as his authorised agent, and that he trusted to her or to chance for payment. The various topics to support either view were fairly submitted to the jury, and appear to have been carefully considered by them. I cannot say their verdict was erroneous; and my impression is, that it was on the whole fair and correct.

In a case of such a character, there are certain rules established

on which we have always acted, and which I have often heard expounded with effect in this Court and in the Exchequer by my LORD CHIEF JUSTICE. We ought to abstain from taking on ourselves the province of jurors; and the general rule is, that the verdict of the jury once found under such circumstances should stand. To this general rule there must be exceptions, but they should be of rare occurrence, and only acted upon where there is somewhat special and perhaps singular in the case. I can find nothing in this case to warrant me in treating it as an exception to the wise rule I have stated. Again, there is another rule of practice acted on in both countries, and frequently enforced in this Court—viz., that a verdict should not be disturbed as being against the weight of evidence, unless the Judge who tried the case reports himself dissatisfied with the result. Mr. Baron Deasy reports here that “if his direction was correct in point of law, the verdict of the jury was a right conclusion from the evidence.”

It seems to me, therefore, that it would be contrary to precedent, and to established and wholesome rules, to set aside this verdict as against the weight of evidence.

HAYES, J.

If the decision in this case were to turn upon the question whether the wife had, under the circumstances proved in evidence, authority to bind her husband for the goods supplied, I should be disposed to think our judgment ought to be for the plaintiff.

Here the wife of the defendant was not only living and cohabiting with him during the whole period in which the goods were supplied, but during that period she was invested by her husband with the control and management of that branch of his domestic affairs to which the goods supplied properly belonged. And in the course of her management it was not only within the scope of her authority, but it was her duty, to purchase and lay in for domestic consumption all necessary provisions; and that may be clearly inferred from what has been proved on the part of the defendant, that a weekly allowance was made to her by the defendant for that purpose; a fact, however, which does not appear to have ever come

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to the knowledge of the plaintiff during the period of the supplies. In this state of things it appears to me that the defendant's wife would have been fully authorised to pledge her husband's credit for goods of that species and quantity which may have been reasonably necessary in the department over which he had placed her. I say "reasonably necessary," for to that extent only would the plaintiff have been justified in inferring that she was her husband's accredited agent. Now, looking at the defendant's condition in life, the state of his family, and his means of living, and applying the very standard which the defendant himself has supplied when he fixed on £5 a-week as a reasonable allowance to be paid to his wife for domestic uses, I do not think it could be said that Mrs. Nolan would have transcended her powers if she had pledged her husband's credit to the extent which is averred by the plaintiff. However, it is contended for the defendant, that the very fact of his making and paying to her the allowance for domestic purposes was of itself sufficient to restrict her authority and prevent the plaintiff's recovery in this suit. But such a result cannot follow, unless it be shown that the plaintiff had notice that the allowance was made and paid. It would be against all reason and justice that he should be prejudiced by a state of things of which he was not conversant; and such was the opinion of every one of the Judges of the King's Bench when giving judgment in *Holt v. Brien* (a). Such would be the law too, if the husband, leaving the condition of his wife in other respects unaffected, had thought proper positively to prohibit her incurring expenses beyond a certain fixed sum, but which prohibition he did not think proper to communicate to the parties with whom she dealt. Such a case would fall within the principle laid down by Erle, C. J., in the very recent case of *Jolly v. Rees* (b), where he says:—"The husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar

(a) 4 B. & Ald. 252.

(b) 15 C. B., N. S. 628; S. C., 10 Jur., N. S. 319.

"to the conjugal relation, but on a much wider ground." But whilst the wife, thus cohabiting with the husband, is authorised to contract debts so as to bind her husband to the extent I have mentioned, it by no means follows that the husband must be answerable for all the debts she may so contract. If the goods have been supplied on her own credit, and not on that of her husband, it is clear he will not be answerable. That question was left to the jury by the learned Judge at the trial. By their verdict they have asserted that all the goods up to the 3rd of December 1863 were supplied on the credit of the husband. In my opinion that verdict is against evidence, and ought not to be allowed to stand.

The plaintiff relies simply on the presumption in his favour which the law raises from the acts of his wife. He does not attempt to show any confirmation by the defendant, or even knowledge of the wife's dealings, with the plaintiff. On the other hand, I think there is quite enough to show that the plaintiff gave credit to the wife and not to the husband; and that he never made any contract with the husband, either directly or by the agency of the wife or any other person. He was wholly unknown to the husband. The dealings were begun by the wife in June 1860; and amongst the earliest of them was a loan of money to the wife. It is quite clear that, so far as that was concerned, the credit was given only to the wife. She had no authority, actual or presumed, to pledge her husband's credit in that respect. From that time until June 1864 (during which period goods were supplied to about £250), and although a debt of £120 was claimed to be due, there was never an application to the husband for payment. In December 1863 a sum of £80 was due, and for that sum a three months' bill is drawn by plaintiff on the wife, as for "value received;" *i. e.*, as I understand it, the plaintiff avers under his hand that the consideration of that bill was value received from the plaintiff by Mrs. Nolan, and not by the defendant. Accordingly, the plaintiff says in his evidence:—"She gave me the bill as cash; she told me she would pay it at maturity." It is remarkable also that, although the plaintiff says he

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kept an account as with the husband, he admits that the husband was not credited with the bill; and moreover he thinks it proper to make the bill payable at his, the drawer's, place of business, in order, as he says, that the transaction might be concealed from the husband. When the bill became due it was by mistake presented at the defendant's house. This was communicated to the plaintiff, and he answered, "I know about that bill; I have been searching in the different banks for that bill, as I did not wish it to be seen below" (at the husband's house). He also said to the defendant's son, who had come from his mother's to speak about the bill, and when handing him the paid acceptances, "This is yours; I am very sorry that it has caused your mother any trouble." The result of all on that occasion was, that the £80 bill was paid by the plaintiff, and a new bill was drawn upon and accepted by Mrs. Nolan for £99. 18s. 0d., the whole amount that was then due. The plaintiff tells us he would not have taken her acceptance only she told him she would have to leave the house if her husband knew she owed so much. At about the time this second bill was falling due, the matter for the first time came to the knowledge of the defendant; and then his wife sent her sister to the plaintiff, to tell him that the defendant had heard of the bill, and to request him, if plaintiff should make inquiries about it, to say it was a mistake; which he said he would do. This whole course of proceeding is utterly inconsistent with the idea that credit had *bona fide* been given to the husband, or that the plaintiff believed any contract had been made with the husband, and is only to be reconciled with the theory that, from the first, credit was given to the wife, and not to the husband. Whenever a trader is found to be actively combining with a married woman to keep any matter concealed from her husband which it is his interest to know, it is of itself putting strong evidence in my mind that he has not been dealing with the married woman as the agent of her husband, but that he is rather offering her opportunities, if not inducements, to deceive and injure her husband; and it would ill become us, by our ruling, to give any encouragement to such a course of conduct.

I am therefore of opinion that there ought to be a new trial, the verdict being against evidence. In this course I am confirmed by the case of *Bentley v. Griffin (a)*, which, though not cited in the argument, appears to me in many respects to resemble the present. But it is said that the present verdict has met the approval of the learned Judge. I do not understand that. He only says that, assuming his charge to be correct, he thinks the verdict was a right conclusion from the evidence given. I think the charge was quite correct; but I do not think the verdict was a sound conclusion from the facts proved, as reported to us by the learned Judge; and as to that point I am of opinion this Court has as good means for exercising its judgment as had the learned Judge at the trial; and therefore this case does not fall within the rule as to not setting aside verdicts, as being against the weight of evidence, when the Judge who tried the case expresses himself satisfied with the verdict.

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In this case I am of opinion that the verdict obtained by plaintiff should be set aside, and a new trial granted. I concur with my Brother HAYES in thinking that the verdict was clearly against the weight of evidence; and I am further of opinion, in which however he does not concur, that the direction given by the learned Judge to the jury was not correct, and that the verdict should be also set aside for misdirection. It is true that the articles for the supply of which the action was brought were suitable to, and consumed in, defendant's establishment; but, on the other hand, it appeared from defendant's evidence that, previous to the supply of any of the items mentioned in plaintiff's account (which commenced in June 1860, and extended to June 1864), the defendant had uniformly paid cash on delivery for all goods supplied to his family, or sent to his house, *and had prohibited her from contracting any debt or buying any goods on credit*, and allowed her £5 a-week for household expenditure, which was to include, amongst other things, the purchase of such articles as were supplied by plaintiff, and was

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over and above certain matters, for which defendant paid himself, such as rent, taxes, servants' wages, &c. Defendant also stated that such allowance was regularly paid by him to his wife, and was ample to cover all the domestic expenses, in addition to the items paid by defendant himself; and that, until June 1864, he did not even know the plaintiff, or know that any account was opened by his wife or family with plaintiff, or with any one, or that she got goods from plaintiff, or from any one, on credit.

In considering the question of misdirection, the truth of these several statements is to be assumed; and they were not indeed controverted during the argument. The learned Judge told the jury "that, when husband and wife were living together, the wife was presumed by law to have authority to order goods suitable to the establishment, for the supply of it; and that the husband was liable for goods so supplied on the wife's order, but that such presumption was capable of being rebutted." That general statement of the law is correct; but the learned Judge further told the jury "that a mere private arrangement between husband and wife, not communicated or known to the party supplying the goods, would not of itself be sufficient to rebut such presumption." Having given this direction, the learned Judge then left to the jury the question, "whether the goods supplied by the plaintiff, or any of them, were so supplied upon the credit of the husband, or whether they were supplied upon the credit of the wife *solely*, with the knowledge or belief that she was acting without authority, and in the hope that, either to avoid exposure, or, through the wife's influence, the husband might unwillingly be prevailed upon to pay for them; and that, in the latter state of things, the husband would not be liable."

It followed, from these directions, that if the jury were of opinion that the arrangement made by the defendant with his wife was not communicated or known to the plaintiff, then they were to give no effect whatever to that arrangement, or to defendant's having expressly prohibited her from buying any goods on credit; but that they were to consider her as having full

authority to pledge his credit, and render him liable for the goods in question (although, in pursuance of that arrangement, he had supplied her with money sufficient to pay for them on delivery); and that the jury were to find the husband liable for the goods, if the plaintiff himself had supplied them on the credit of the husband, and had not supplied them on the credit of the wife *solely*, with such knowledge, belief, or hope, as stated in the Judge's charge. It appears to me that these directions of the learned Judge are at variance with the principles which regulate the authority of a wife to pledge her husband's credit.

We have been referred by Counsel to several authorities upon the subject, the clear result of which is, that the power which a wife has to bind her husband by her contract is as his agent, by virtue of an authority from him, express or implied. This principle is fully established by the decisions in various cases cited in the argument, commencing with that of *Manby v. Scott*; though some of them may be conflicting as to the application of that principle. In the case of *Read v. Teakle (a)* the action was brought to recover the price of some musical publications sold to defendant's wife; and the question left to the jury was, whether music was a necessary for a person in her condition of life. The jury found a verdict for the plaintiff; but, on a motion for a new trial, it was held that it should have been also left to the jury whether, upon the facts proved, the wife had authority, express or implied, to bind her husband by her contract. The same principle, that the power of the wife to bind her husband is "*as his agent*," is also laid down and recognised in the cases of *Holt v. Brien (b)*, *Montague v. Benedict (c)*, *Renaux v. Teakle (d)*, and *Jolly v. Rees (e)*, to which I shall presently refer. And it is observed by Erle, C. J., in that latter case [page 641] that if the wife's power to bind her husband be in the capacity of his agent, it would be "*a solecism* in reasoning to say that "she derives her authority by his will, and at the same time to "say that the relation of wife creates the authority against his "will by a *præsumptio juris et de jure* from the marriage." It

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(a) 13 C. B. 627.

(b) 4 B. & Ald. 252.

(c) 3 B. & C. 631.

(d) 8 Exch. 680.

(e) 15 C. B., N. S. 628.

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is also settled that, where the husband and wife live together, the presumption of law is, that the wife has his authority to bind him by her contract for necessities, such as the goods in question, which were requisite and suitable for the support of the establishment, and which were supplied and used for the purpose, but that such presumption is liable to be rebutted. And the question for our consideration in the present case is, whether that presumption is not sufficiently rebutted, and the presumed authority of the wife determined by the arrangement made between defendant and his wife, by his positive directions that she should not contract any debts, or get any goods on credit, and by his having supplied her with money sufficient to pay for them on delivery, even though the plaintiff had no notice of such arrangement. With respect to the necessity of such notice, plaintiff's Counsel have relied on the observations of Mr. Justice Bayley, in *Holt v. Brien* (a), where that learned Judge, after stating that "If a husband gives no allowance to his wife, he "gives her a general credit, and that she might contract debts for "the necessary supply of herself and her family, for which he would "ultimately be liable, on the ground that in such a case she was to be "considered as his agent in contracting the debts," adds further:—"But if he supplies her with a sufficient allowance for the purpose "of paying for those necessary supplies, *and the tradesman with whom she deals has notice of it*, and afterwards trusts her, he "does so at his own peril, and will only be entitled to recover by "proving that in fact the allowance was not regularly supplied." And Counsel rely upon this reference to notice as showing Mr. Justice Bayley's opinion to have been, that the tradesman would not be affected by such arrangement except he had notice of it. But, as in that case, the tradesman had notice of the arrangement, and it was therefore held that the husband was not liable, it was not necessary for the Court to consider what the effect of the arrangement would have been if the tradesman had *not* notice of it. The decision in that case is therefore no authority for the proposition contended for; and the observations of the same eminent Judge, in the subsequent case of *Montague v. Benedict* (b), would imply that he did not

(a) 4 B. & Ald. 252.

(b) 3 B. & C. 631.

entertain the opinion attributed to him. In that case, though the goods supplied were not necessities, he lays down the following rule as to the husband's liability for them:—"Whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of his wife, except where there was reasonable evidence to show that the wife had made the contract with his assent." Holroyd, J., also in that case refers to the husband's liability for necessities provided for his wife, as arising from his neglect to provide them himself. In the subsequent case of *Seaton v. Benedict* (a), Best, C. J., states:—"A husband is only liable for debts contracted by his wife, on the assumption that she acts as his agent. If he omits to furnish her with necessities, he makes her impliedly his agent to purchase them." If, then, in the case of a husband supplying his wife with sufficient money to purchase necessities, his liability to her contract for them on credit depends upon the fact of his assent, express implied, to that contract, it would I think be difficult to contend at where he had so supplied her, and had prohibited her from entering into any contract on credit, and had no knowledge or notice of her having done so, still his assent to it should be implied from the circumstance that the trader (of whose dealings with the wife the husband was wholly ignorant) had not got notice of the husband's prohibition, or of his arrangement with his wife. Again, *Renaux v. Teakle* (b), a verdict was obtained against defendant, for the price of various articles of dress supplied to defendant's wife, during fourteen months, and found by the jury to be suitable to her station in life. It appeared that defendant had allowed his wife a yearly sum for her dress, but it did not appear that the plaintiff had notice of such arrangement. The defendant at the trial tendered evidence to show that the wife had been otherwise supplied with dress during that period. The evidence was rejected by the judge; and the Court set aside the verdict on that ground. Marshall, B., in his judgment says:—"Assuming that the wife had prima facie authority to bind her husband, still, if the husband applied her with sufficient dress, her authority to bind him was

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(a) 5 Bing. 28.

(b) 8 Exch. 680.

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"at an end." And Pollock, C. B., says :—"A wife is not in a different position from any other person in the establishment. If a servant goes to a shop, and orders goods in the name of his master, the tradesman is bound to inquire before he gives credit. If he does not, and it turns out that the order was without authority, the tradesman cannot sue the master."

Plaintiff's Counsel, however, rely on two subsequent cases of *Ruddock v. Marsh* (a) and *Johnston v. Sumner* (b). In the former case, the goods supplied were groceries and other provisions; and the Recorder, who tried the case, told the jury that it was no defence to the action that the defendant had regularly supplied his wife with money sufficient to have kept his house without running into debt, of which fact no notice had been given to the plaintiff. The plaintiff obtained a verdict. An application to set it aside was refused; and Pollock, C. B., in delivering judgment, said :—"The objection to the Recorder's ruling was, that he directed the jury that the wife was a general agent for the husband. Without saying that a wife in every case has such an authority to bind her husband, we are of opinion that the direction was correct with reference to the circumstances of the case. A partner is a particular kind of agent, who has a general authority to bind his partner by contracts made in the course of business; and in like manner, a wife has authority with reference to such matters as are usually under the control of the wife. If that authority is broken in upon, it must be by special circumstances, which do not appear in the present case." In *Johnston v. Sumner* Chief Baron Pollock went further, and stated :—"If a man and his wife live together, it matters not what private arrangement they may make, the wife has all the usual authority of a wife." In that case, however, the husband and wife were separated; and the plaintiff was nonsuited on that ground; so that the opinion expressed by the Chief Baron was not necessary for the decision of the case. These two authorities are relied on for plaintiff, as establishing that a trader is not affected by such an arrangement between husband and wife as was made in the present case, except

(a) 1 H. & N. 601.

(b) 3 H. & N. 261.

the trader had notice of it. But it appears to me that, so far as these two cases could have that effect, they are at variance with previous authorities, and with the principles laid down by the same Court in the case of *Renaux v. Teakle* (a), to which I have already referred, and are overruled by the subsequent decision in *Jolly v. Rees* (b), which goes much further to restrict the liability of a husband for his wife's contracts than is necessary for defendant in the present case. In *Jolly v. Rees* it appeared, from the evidence and findings of the jury, that the articles supplied on the order of the defendant's wife in 1860 and 1861 (viz., drapery and millinery goods) were necessities, being suitable to the condition of defendant's wife and daughters; that, in 1851, defendant had expressly prohibited his wife from buying any goods on credit, and had promised her a yearly allowance, which, in addition to an annuity she had for her separate use, would have been sufficient (if regularly paid) for the clothing of herself and her daughters; but that such allowance was not regularly paid, and that so much of it as was paid was insufficient for the purpose. It also appeared that the plaintiff had no notice of defendant's prohibition to his wife, or of the arrangement between them. It will be observed that the grounds relied on in that case for holding the husband liable were much stronger than those existing in the present, inasmuch as the allowance actually paid was insufficient; whereas in the case now before us, the fact is otherwise. But notwithstanding the non-payment of a sufficient allowance, it was held by the Court (Byles, J., dissenting) that the husband was not liable. Erle, C. J., delivered the judgment of himself, Williams, J., and Willes, J., in which he stated (amongst other matters) that a wife could not make a contract binding on her husband, unless he gives her authority as his agent so to do; that the presumption of a wife's authority to bind her husband, while they live together, by her contract for articles suited to her station, was always open to be rebutted; and that, as the necessities for which the verdict was had were obtained from the plaintiffs by defendant's wife, without defendant's authority, and contrary to his order,

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(a) 8 Exch. 680.
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(b) 15 C. B. 628.
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such verdict could not, according to their view of the law, be supported. That case is a strong authority in defendant's favour, as the goods there supplied were (as observed by Byles, J., in his judgment, p. 643) necessities in the strictest sense, being not only suitable to the station of defendant's wife, but also indispensable, because not supplied from any other source. According to that decision, the husband would not be rendered liable, by the non-payment of a sufficient allowance, after he had expressly prohibited his wife from getting goods upon credit—a proposition which it is not necessary for the defendant in the present case to establish.

Plaintiff's Counsel, during the argument, have urged the hardship that would result from holding that a trader, supplying on the wife's order necessities of which the husband had the benefit, by their being consumed by himself and his family, should be precluded from recovering payment for them by reason of an arrangement between the husband and wife which was unknown to him. But it is to be considered that every trader has the power, by previous inquiry, of avoiding that difficulty and risk, and that, as remarked by Holroyd, J., in his judgment in *Montague v. Benedict* (a), it is the duty of a trader, if he wishes to make a husband responsible for goods supplied to the wife, to inquire if she has her husband's authority or not; and that it would be also a hardship on a husband if, after giving his wife a sufficient allowance to pay for all necessities on delivery, and expressly prohibiting her from buying them on credit, he should nevertheless be held liable, after a lapse of years, for contracts made by his wife without his knowledge, and contrary to his orders, with traders of whose dealings with her he was altogether ignorant, and who had not adopted, during that period, the reasonable and simple precaution of inquiring from the husband as to the wife's authority, or apprising him of those dealings, or even applying for payment. It would be different if the husband had in any way, expressly or impliedly, sanctioned or acquiesced in his wife's dealings; but, if that be not the case, I think that the loss should

(a) 3 B. & C. 637.

fall upon the trader, who had the power to prevent it, but did not do so. In the present case, the defendant did not know the plaintiff—was not aware that any account was opened with him—and, though he saw that the goods were supplied, he was warranted in assuming that they had been paid for by his wife on delivery, pursuant to his directions to her. With respect to the expediency of giving a wife greater power to bind her husband by her contracts, Chief Justice Erle, in his judgment in *Jolly v. Rees* [p. 641], observes that, as the husband sustains the liability for all debts, he should therefore have the power to regulate the expenditure for which he is to be responsible, by his own discretion, and according to his own means; and, further, that if the law was clear that the husband was protected from debts incurred by the wife without his authority, then speculations upon the imprudence of a thoughtless wife would be less frequent, because less profitable. In the previous case of *Montague v. Benedict*, Chief Justice Abbott, when expressing his concurrence in the decision of the Court, stated [p. 638] “that, if such decision had the effect of introducing more “caution into the conduct of those who obtained their living by the “sale of goods and wares, it would be beneficial not only to husbands, “fathers, and infants, but also to those who had goods to sell.” The grounds which I have stated for exempting the husband from liability, in the case now before us, would not of course be applicable in a case where, by acquiescence or otherwise, a husband had so acted as to raise a belief in others of the authority of his wife to enter into the contract sought to be enforced. In such a case the husband would properly be held liable; but that is not the present case.

I am accordingly of opinion that the presumption of the authority of defendant's wife to order the goods in question, which arose from their cohabitation, was rebutted by the proof of defendant's prohibition to his wife, and of the arrangement made between defendant and her, and of the regular payment by him of a sufficient allowance; and that the presumption was rebutted by those facts, even though the plaintiff had no notice of them.

My Brother HAYES has stated fully the grounds upon which, in his opinion, the verdict was against the weight of evidence.

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I concur with him in thinking it clear, upon the evidence, that plaintiff gave credit, not to the husband, but to the wife. It appears from the accounts, commencing 1st of June 1860, that the first item was for £5, cash lent to defendant's wife, for which she clearly had no authority to bind her husband. That sum was not repaid until the following October, although in the interval all the weekly bills for goods were paid for by the wife; and in November 1860 a further sum of £6 was lent by plaintiff to the wife. It also appeared that, in the course of the dealings, when a considerable sum was due to plaintiff, he applied to the wife for payment; that she told him she would have cleared the account only she had to buy furniture for her daughter on her marriage; that he drew a bill upon her, which she accepted for him. And he states in his evidence that "he would not have taken her acceptance, only she told him that she would have to leave the house if defendant knew she owed so much." And also, "that he (plaintiff) made the bill payable at his own house, in order to conceal it from the defendant." He drew another bill on her on account of his debt, which she also accepted, unknown to her husband.

Plaintiff further stated in his evidence that, about the time one of those bills was falling due, defendant's son came to him, and said that the runner of the bank had called at defendant's house, and that he (plaintiff) would ruin defendant's wife by such transactions; whereupon *plaintiff himself* took up the bill from the bank. And he admitted that, during the whole period from 1st of June 1860 until the end of May 1864, he never applied or furnished any account to defendant himself.

Without going further into the evidence, which has been already more fully stated by my brother HAYES, I think it clear that the jury came to a wrong conclusion, and that the verdict should be set aside on that ground also.

LEFROY, C. J.

In this case I might satisfy myself by saying, that I am clearly of opinion that the verdict cannot stand. The evidence amounts

to a mere conspiracy to keep the husband in the dark during the time the goods were supplied to the wife. But, as an important question of law has arisen, I feel it my duty to state shortly my view of it,—a view founded upon the way in which the Law of England was laid down above one hundred years ago, and which (though there may be found some subsequent observations inconsistent therewith) is still the Law of England. Lord Hale coincides in that view of the law with Lord Holt and the other eminent Judges of England, who have been referred to. I therefore do not hesitate to say that this verdict cannot stand. It was an oversight, with respect to the duties of a husband, and the privileges of that condition, that has led to it. The duty of a husband is to provide necessary food and clothing for his wife and family; but his right is, that he should choose a person to provide those necessaries, and be the judge of what his means allow; and if he makes that provision, by buying these articles himself, or if he gives a sufficient supply of money to his wife, there is no authority that says, or could say, that the husband has lost his right to judge of the sufficiency of these necessaries. But it is said, why is a private agreement between wife and husband to be allowed to rob the tradesman of the price of his goods? I say, why is a private agreement between the wife and the shopkeeper to be maintained to the prejudice of the husband? If the husband has given authority to give goods on credit, then no arrangement can divest the shopkeeper of the right to charge the husband for his goods. But, if the husband has supplied money to his wife, no case can be cited to show that a man is to be made liable who has thus discharged the duty which the law imposed upon him; or to deprive him of protection from a private arrangement between the shopkeeper and the wife. It appears that from the very outset the defendant discharged this duty. There does not appear the slightest intimation that the goods were supplied on credit. Every husband is entitled to make this arrangement, and is not to be liable to have a bill run up, because the shopkeeper chooses to furnish the goods on credit. It is a mistake to say that there is a *præsumptio juris* to render

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Rees (a)—ought to be set in letters of gold :—"Taking the law
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"capacity of his agent, it is a solecism in reasoning to say that
"she derives her authority from his will, and at the same time
"to say that the relation of a wife created that authority against
"his will, by a *presumptio juris et de jure* from marriage." "The
"wife cannot make a contract binding on her husband, unless he
"gives her authority as his agent so to do." While he has been
applying means according to his income, and has never authorised
the dealing on credit, no private arrangement in derogation of
the husband's rights can be maintained. The question is not
whether the plaintiff had notice of the arrangement between the
husband and wife. The question is, as Chief Justice Erle says,
had the husband authorised the wife to pledge his credit? There
is no *presumptio juris* that a husband by his marriage has autho-
rised his wife to pledge his credit. It may arise from circum-
stances, if there is anything to induce a shopkeeper to think that
the husband has sanctioned this arrangement. If the husband
does not discharge his duty, the wife may provide for herself
and her children. But, if he has provided money from time to
time, she cannot pledge his credit without his authority.

(a) 15 C. B., N. S. 639.

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Exchequer Chamber.

THE QUEEN v. CROSTHWAITE.*

June 6, 10, 13.

THIS case came before this Court on appeal from the Court of Queen's Bench.† The only question argued was, whether females had a right to vote under the 17 & 18 Vic., c. 103.

On the 6th day of June the case was argued by:—

J. T. Ball and *Curtis*, on behalf of the relator.

Heron and *Jellett*, contra.

The arguments advanced by Counsel on both sides were substantially the same as those addressed to the Court below. On a subsequent day this Court directed that the case should be further argued by one Counsel on each side.

J. T. Ball (with whom was *Curtis*), for the relator.

At Common Law there is in women an inherent disability to exercise public franchises; and statutes must be construed with reference to the principles of the Common Law: *Dwarris on Statutes*—[PIGOT, C. B. What authority does Mr. *Dwarris* cite for that proposition?—None.—[PIGOT, C. B. I think that he goes a little beyond what the law warrants. The corresponding proposition in *Comyn's Digest* does not go so far.]—But in *Stowel v. Lord Zouch* (a) the broad proposition is stated, that the Common Law “is the best interpreter of the words of positive laws;” and, in *Miles v. Williams* (b), it is said:—“The best rule of construing “Acts of Parliament is by the Common Law, and by the course “which that observed in like cases of its own before the Act”—[page 252]. Therefore, positive language may be controlled by

Towns Improvement (Ireland) Act 1854. Section 22 defines the qualifications of voters at the election of Town Commissioners:—
 “Every person of full age who is the immediate lessor,” &c., also
 “Every person of full age who shall have occupied as tenant or owner, or joint occupier, or shall have been the immediate lessor of any lands,” &c.

Held (MONAHAN, C. J. PIGOT, C. B., and BALL, J., *dissentientibus*), reversing the decision of the Queen's Bench, that women, though possessing the qualifications mentioned in these sections, were not eligible to vote at such election.

(a) 1 Plowden, 365.

(b) 1 P. Wms. 249.

* Before MONAHAN, C. J., PIGOT, C. B., BALL, KEOGH, and CHRISTIAN, JJ., and FITZGERALD and DEASY, BB.

† See this case in the Queen's Bench, *supra*, p. 157.

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general analogy. So, in *Thursby v. Plant* (a), the law is thus stated :—" And the better construction of a statute is, to expound it as near the rule of the Common Law as may be."—[PIGOT, C. B. I think that the proposition stated by Mr. *Dwarris* is, that the Common Law cannot be altered except by express legislation, or by necessary implication.]—In construing statutes, the principles of the Common Law must always be borne in mind. In *Minet v. Leman* (b) Sir John Romilly said :—" This principle of construction, as a general proposition, cannot be disputed ;" and yet he took the general Inclosure Act out of the principle.—[PIGOT, C. B. That is at right angles with the rule of construction laid down in *Warburton v. Ivie* (c).]—That class of cases may be distinguished from the one now before the Court. In *Warburton v. Ivie* it was not disputed that the grammatical sense of the words, as they stand, must be taken. But if, as happens here, the words are not express, then the general policy must be resorted to.—[PIGOT, C. B. Nothing can be more correct than that proposition, if the words of the statute are ambiguous.]—But in *Minet v. Leman* the words were not ambiguous ; and yet Sir John Romilly resorted to the general policy to aid him in construing the statute. Even a repealed statute may, it seems, be used to assist in expounding an existing one : see *The Queen v. The Inhabitants of Merionethshire* (d). Acts *in pari materia* must all be construed together : *Dwarris on Statutes*, p. 569. There is a code of laws to be considered in this case. The 9 G. 4, c. 82, a previous Towns Improvement Act for Ireland, uses language applicable to either sex.—[DEASY, B. No ; look to its 6th and 22nd sections.—MONAHAN, C. J. That Act, however, contains no express provision on the subject, nor any glossary.—CHRISTIAN, J. The 42nd section confessedly includes females. The words "person or persons, or his or their representatives, primarily chargeable with the same," clearly include women ; and the word "his" manifestly includes "her."]—The language of section 16 is general.—[MONAHAN, C. J. It really comes round ultimately to this, that if that statute's general policy was to include

(a) 1 Wms. Saund. 240.

(b) 20 Beav. 278.

(c) 1 H. & Br. 623.

(d) 6 Q. B. 347.

women, the word "his" would be construed so as to include them.—CHRISTIAN, J. The general Act, 13 & 14 Vic., c. 21, if it is to be construed as largely as its words, would seem to do away, by its fourth section, with all difference in the Acts.—It would be impossible to act upon that rule.—[CHRISTIAN, J. There would be great difficulty in applying it to antecedent Acts.]—Neither could it be applied to Acts which contain anything whereby to construe them.—[CHRISTIAN, J. You mean that a glossary is in fact an *express provision*.]

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In the 3 & 4 Vic., c. 108, "men" manifestly means "male persons." That statute answers the argument derived from the Poor-law Acts, under which women vote for poor-law guardians.—[MONAHAN, C. J. How is it that women vote for poor-law guardians? Is it by force of general words in the Acts?—Yes.—[MONAHAN, C. J. Has their right to do so ever been decided upon?—No; but it has been exercised. The poor-law franchise however is exercised by a voting paper. The electors are not exposed to personal violence, as they would be at turbulent elections. The 10 Vic., c. 16, notwithstanding its interpretation clause, uses a phrase which shows that women were not intended to vote under it. Section 28 directs the poll to be closed at four o'clock, p.m., "unless in case of riot or obstruction." That Act is incorporated with the 17 & 18 Vic., c. 103, and is, moreover, not confined in its operation to Ireland. But females in England do not vote for town commissioners; and yet they will be able to do so if this Court puts a coercive interpretation on this statute. The word "householder" is used in the 9 G. 4, c. 82, s. 2, as well as in the 17 & 18 Vic., c. 103, s. 4. The sixth section of the latter Act directs the convention of all person who are entitled to vote at the preliminary meeting.—[MONAHAN, C. J. It leaves out a very important body, who are clearly entitled to vote under section 7.—DEASY, B. Section 6 applies only to residents.]—Just so. The language of the schedule is merely a form, which may or may not be followed, like that in the schedule of the Common Law Procedure Amendment Act (Ireland) 1853, but is not binding. The 21 & 22 Vic., c. 98, is

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Heron (with him *Jellet*), for the defendant.

At Common Law women are not subject to any inherent disqualification. There are only two Common Law franchises for local offices—those of sexton and churchwarden; and women exercise both of them. They also vote for poor-law guardians under the general words of a very modern statute. They likewise vote as shareholders in various companies.—[BALL, J. I understood Mr. *Ball* to confine his argument to the case of public franchises.]—Then, from the time of Henry the Third to the present day, women have been excluded, no doubt, from exercising the parliamentary franchise, but only by the express words of statutes, or by the language of the writs which the Crown, in the exercise of its prerogative, issued to the persons who were to summon the electors, by whom Members of Parliament were to be returned: *May's Parl. Practice*, 5th ed., pp. 21, 22. At the latter page will be found the form of writ which still remains in use.—[FITZGERALD, B. Is not that evidence that the Common Law excluded women?—No; there was not, at the remote period at which that writ was framed, any Common Law or custom. The first trace of the principle of representation is to be found in the fact, that the knights were to be chosen by the men of the county. The writs, however, issued from the prerogative of the Crown, and not by virtue of the Common Law, or of any custom.—[FITZGERALD, B. Do you mean to say that there was not any Common Law before the reign of Henry the Third?—None applicable to the summoning of Parliament. Simon de Montfort might, if he had pleased, have directed the Sheriff to receive the votes of the tenants *in capite* who were women.—[DEASY, B. So late as the reign of Henry the Eighth it was doubted whether a woman could, as of right, wear the Crown of England: that was one of the objections to the title of his daughter.]—In revolutionary times it was doubted; but "*silent leges inter arma*." The earliest Acts touching the parliamentary franchise—8 *Hen.* 6, c. 7, and 10 *Hen.* 6, c. 2—must be read together. They are not

declaratory of the Common Law, but by positive legislation *created* the franchise. Had the Common Law disqualified women, the Reform Act need not have limited the parliamentary franchise to "male" persons.—[KEOGH, J. Was that the first time that the word "male" was used?—Yes, with the exception of the old statutes to which I have referred, and which regulate the franchise down to the time of the Reform Act.—[DEASY, B. Have you referred to the words of the Irish Act of 1793, and of the Roman Catholic Emancipation Act?—In the latter Act the words are, "every male person." Besides being denied the parliamentary franchise, women are also by statute disabled from serving as jurors: 3 & 4 W. 4, c. 91, s. 1.—[PIGOT, C. B. Have you looked into the mode of electing coroners?—No.—[PIGOT, C. B. That was a much earlier franchise than the right to elect Members of Parliament.]—It is idle to contend for a Common Law disability in women, since in old times a woman was keeper of a castle on the marches. It was her duty to determine whether a breach of the Mutiny Act had been committed within the castle, and to exercise the powers of life and death.—[FITZGERALD, B. Was not one of the grounds of the decision in *Lady Russell's case* this, that the castle was not a war castle?—Yes. A woman too has been a High Sheriff; and yet she might, as such, have been obliged to execute culprits with her own hands.—[FITZGERALD, B. A conflict has sometimes taken place between two rules of law; and all that those cases prove is, that the Common Law incapacity, if it existed, yielded to the legal rule of descent.]

An argument, adverse to the defendant, has been drawn from the wording of the Poor-law Acts. The words of the 1 & 2 Vic., c. 56, s. 80, are general: "him" may be read "their."—[DEASY, B. Look at sections 81, 82, 84, and you will find that they are exclusively confined to "males."—Yes.—[DEASY, B. If the language of its interpretation clause receives its full import, a woman may be a poor-law guardian.]—The object of the interpretation clause is merely to prevent the repetition of words designating number or gender. At all events there is not any reason why a woman should not be a poor-law guardian, as well as a commissioner of sewers,

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whose duties are explained in 3 *Black. Com.*, p. 73. Notwithstanding the nature of these duties the office has been filled by a woman: 14 *Vin. Abr.*, tit. *Feme*, p. 158; *Collis on Sewers*, p. 296.—[DEASY, B. Those commissioners of sewage were drainage commissioners.]—No doubt.

According to the principles of the Constitution there must be representation wherever there is taxation. That principle applies to cases of local as well as of general taxation.

Ball was heard in reply.

Cur. adv. vult.

DEASY, B.

June 13.

In this case the only question argued before us was, whether women were entitled to vote at an election of Town Commissioners under the 17 & 18 *Vic.*, c. 103. In considering that question it is important to refer to the previous legislation with respect to the government of towns in Ireland. The first Act upon the subject is the 9 *G.* 4, c. 82. That Act extends to cities, towns corporate, boroughs, market towns, or other towns in Ireland; and it provides for their local government a machinery very similar to that which is provided by the Act now under our consideration. There is to be a memorial to the Lord Lieutenant, signed by twenty-one householders, praying to have it brought into execution. There is then to be a meeting convened, at which every person residing within its limits, and assessed by vestry-cess in respect of a tenement of the annual value of £5, shall be admitted to vote, in order to decide whether the Act shall be adopted or not; and then, if that meeting shall decide that the Act is to be adopted, in the whole or in part, there is to be a further meeting for the election of Commissioners to carry it into effect; and every person assessed in respect of a tenement of the annual value of £20 is qualified to be elected a Commissioner; and every person assessed in respect of a tenement of the annual value of £5 is to be entitled to vote. And at all future elections of Commissioners, every person assessed in respect of a dwelling-house of the annual value of £5 is declared entitled to vote under that Act. Though the general term "person" is used,

I think it is plain that only men could vote, and for that I refer to sections 6 and 22. When the Poor Relief Act was passed, it was deemed expedient to substitute the valuation made under its provisions, both for the assessment under the vestry-cess, which had in the meantime been abolished, and for the special assessment which the Commissioners under that Act were directed to make for the purposes of it. And the provisions of the Act 6 & 7 Vic., c. 93, ss. 12 and 13 make it, I think, perfectly clear that in towns, the government of which was regulated by the 9 G. 4, and by that Act, no females could claim to vote although occupying tenements of the specified value. In the interval between the passing of the 9 G. 4, and the Act now under discussion, was passed the Municipal Reform Act, and by that the right of voting for the election of the persons who were to exercise the powers of local government and taxation over all towns in which the corporate bodies were contained was exclusively confined to men; and that Act contained a provision authorising the Crown to grant a charter of incorporation to any town, not included in schedule A to that Act, which contained a population of 3000 persons; and upon the grant of such charter, the provisions of the Act were to apply to the town incorporated. That was the state of the law when the Towns Improvement Act was passed. No one had a right to vote either in towns governed by corporations under the Municipal Reform Act, or in those governed by the 9 G. 4, but men. That Act professes to make better provision for the lighting, paving, &c., of towns in Ireland; and it applies both to towns under the 9 G. 4 and to all other towns in Ireland, except the cities of Dublin, Cork, Limerick, and Derry, and the town of Belfast; but it does not state any intention to make any serious change either in the governing body or in the constituency who were to elect them. We ought, I think, to require strong proof of the intention of the Legislature to make so great a departure from its previously expressed policy, and so great an alteration in the constituted body as that now sought, before we sanction such an infringement on that policy, and such an alteration of that body as that which is now asked of us. The first thing that strikes one on

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reading the provisions of the Towns Improvement Act is the analogy to the 9 G. 4 which is apparent in it. There is first to be a memorial to the Lord Lieutenant, signed by twenty-one householders, praying that the Act, or some portions of it, may be brought into execution. There is to be then a meeting to determine whether the Act is to be adopted in the whole or in part; and if the meeting decide that it is to be adopted, and the Lord Lieutenant approve the decision of the meeting, there is to be then another meeting for the election of Town Commissioners. Now in both the preliminary proceedings it is admitted that women cannot intervene. The twenty-one householders who are to apply to the Lord Lieutenant must be exclusively men; and none but men, it is admitted, can be summoned to, or vote at the meeting which is to decide whether the provisions of the Act are to be adopted in the whole or in part. That would indicate an intention on the part the Legislature to give the right of administering the Act, or electing those who were to administer it, to that sex which had the exclusive right of bringing it into operation; and I think that indication of intention is confirmed by a careful consideration of the terms of the Act. In no part of it is there any indication of an intention to make so serious a distinction as that now sought to be established between the constituted bodies created under the 9 G. 4 and under the Municipal Reform Act and those created under the Act now under consideration. The language of the portions of the latter Act which define the qualification of those who are to vote at the first meeting, which is to decide whether the Act is so to be adopted (section 7), of those who are to vote at elections of Town Commissioners, and of those who are to be elected Town Commissioners, is in this respect similar to that used in the 9 G. 4; that is, in both Acts the word "person" is used, and in the 22nd section of this Act, the words as to payment of rates payable by him are nearly similar to the words of the sixth section of the 9 G. 4, and equally show that the Legislature contemplated a constitutional body composed of males only. If it were not for the glossary clause in the first section of this Act, there would be no doubt that the 22nd section of this Act gave the right of voting

to men only; and the question we have to decide is, whether that clause controls and qualifies the plain words of the 22nd section, which, if taken by themselves, would leave the franchise in towns situated as the town of Kingstown is in precisely the same condition, so far as sex, as the franchise in towns under the 9 G. 4, or the Municipal Reform Act. Now, the glossary clause, so far as relates to the present question, is, that words importing the masculine gender, except only the word male, shall include females. But that is contradicted by the general saving at the commencement of the clause, unless there is something in the subject or context repugnant to such construction. Is there anything then in the context repugnant to such construction? I think there is. The seventh section, which defines the qualification of the persons who are to vote at the meeting which is to decide whether the Act is to be adopted or not, uses terms quite as general as the 22nd section, and differs from it only in the amount of the qualification required. But it is plain from schedule A, that by the general words then used, the Legislature did not intend to include females; for by the form of notice of meeting given in that schedule, males only were to attend to vote. Again, in section 25, where the qualification of Commissioners is defined, words equally general are used; and yet it is plain, I think, both from the language of that section, particularly the exception as to ecclesiastics, and from the nature of the duties imposed upon, and the powers given to Commissioners, that it never was intended that a female should be elected to the office. Indeed it was expressly admitted by Mr. *Heron* that, under this section, women could not be elected to, or fill the office of Commissioners.

I think, therefore, that looking to the provisions of this Act and its object, and the provisions of analogous Acts dealing with the same subject-matter, that we ought not to control the plain words of the 22nd section by the general declaration in the glossary clause; but that we ought to give it such a construction as will give effect to every part of it, and at the same time make it, or rather keep it, consistent with the previous enactments of the Legislature, and the policy there expressed. But I am unwilling to rest my

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judgment exclusively upon the provisions of the statutes regulating the local government of towns in Ireland. I think that there is a far more exclusive principle involved in this case, and that is, the right of women to intervene personally by their votes in contested elections for public officers entrusted with powers of government, either local or general. I think the general policy of the law is to exclude them from any such intervention; and that that policy is founded partly on the supposition that such subjects are beyond their cognizance, as requiring a judgment superior to that which they possess, and partly upon the ground that it is inconsistent with the delicacy and modesty of their sex that they should be mixed up in the strife and turmoil of a contested election. In the case of *Olive v. Ingram* (a) the question was as to the competency of women to vote at an election of sexton. After much discussion, it was held that they were competent to vote; but the reason assigned by Lee, C. J., is, that the sexton's duty seems to be of the nature of a private trust, and not of a public function; in which case he says, I incline to think women have not a right of voting, though not positively excluded. And all the other Judges rested their judgments partly upon the nature of the office, that it was not of a public nature, and the choice did not require skill or judgment, and partly upon the ground that the office was one which a woman was capable of filling. In that case a doubt was expressed by one of the Judges, whether a woman could not vote at an election of a Member of Parliament; but for that doubt there is not the slightest foundation. From the first appearance of the earliest form of Parliamentary representation, down to the passing of the Reform Acts, there is no trace of the direct intervention of women in Parliamentary elections; and their exclusion from them, at least in modern times, is to be ascribed to no precise enactment, and no positive rule of law, but must rest upon the general principle of public policy to which I have referred, and which excludes them from direct intervention in the political affairs of the kingdom. To that principle must be referred the exclusion of peeresses in their own right from voting, even by proxy, in the House of Lords. That principle was engrafted on

(a) 7 Mod. 263.

the Reform Acts of England, Ireland, and Scotland, which expressly confine the Parliamentary franchise to men. It was further adopted in the Acts regulating the municipal government of towns in Ireland, preceding that now under our consideration; and it would be a departure from that policy, not required by the language of that Act, if we were now to hold that women were entitled to vote at elections for Town Commissioners under the Act now in question. That Act, by the clauses of the English Town Commissioners Clauses Act, which are incorporated with it, provides that those elections shall take place at public meetings. One of those clauses thus incorporated with it, section 28, contemplates the possibility of riot, or obstruction of the poll, occurring at that meeting: and I think that the appearance and intervention of females at such meetings, held under such circumstances, and for such purposes, and liable to such interruptions, would be inconsistent with the policy of the law, and a violation of those decent restraints which the custom and opinion of society impose upon their sex.

I think this a serious political and social innovation, and that before sanctioning it by our decision, we ought to have some stronger reason than that which is afforded by a glossary clause in an Act of Parliament.

FITZGERALD, B.

The question in this case is in effect whether women are entitled to vote at the election of Town Commissioners under the statute 17 & 18 Vic., c. 103. The qualification of electors is prescribed by the 22nd section of the Act. That section contains no words expressly requiring the electors to be males; women are capable of holding and possessing the property required by the statute; and though the section twice applies the word "him" to every person so qualified, yet there is a provision in the first section of the Act that, "words importing the masculine gender, except only the word 'male,' shall, in the construction of the Act, unless there be something in the subject or context repugnant to such construction, include females." The word "him," in the 22nd section, may, therefore, unless there be

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The contention of the defendant is, that the section ought to be so read; and it plainly lies on the relator to satisfy the Court that there is some repugnancy in the subject or in the context of the Act to such construction. I am not, however, prepared to give to the interpretation clause of this, or any other Act of Parliament, the very stringent effect which seemed to be asserted in the argument on the part of the defendant. On the one hand, I take it to be clear that, without the aid of any interpretation clause, words of an Act of Parliament importing the masculine gender may be construed to include females; but in such case the onus of showing a sufficient reason for so doing will lie in the party asserting that it should be done. On the other hand, the interpretation clause shifts the onus, and throws on the party asserting that the words should not be so construed the necessity of showing a sufficient reason why they should not be so construed.

Now it is, I apprehend, a settled rule of construction that every statute ought to be construed according to the reason and rules of the Common Law. Each statute assumes the known existence of the antecedent law, and save so far as it expressly, or by necessary implication, alters that law, must be interpreted according to its reason and rules. No one can, I think, doubt that, though idiots and lunatics are not expressly excluded from the persons qualified as electors according to the 22nd section of the Act; and though they are capable of being owners of property giving the qualification required by it, they are yet excluded by the reasons and rules of the Common Law from the purview of the section, as being considered destitute of the discretion necessary to the performance of the duties of electors.

To ascertain whether there be or be not anything repugnant to the subject in construing the word "him," as if it were "him or her," we must inquire what the antecedent law is as to the subject—viz., the electors for a public office of trust. One main contention on the part of the relator has been that, by the

reason and rules of the Common Law, repeatedly recognised in statutes, women are not considered persons competent or proper to discharge the duty of electing to offices of public trust and government; and that though by the aid of the interpretation clause and the Act now before us, words sufficient to include them as electors are used, the operation of those words is limited by the antecedent law. That the law in recognising the distinction of the sexes assumes a greater worthiness in the male than the female, is manifest from the law of descent; that it has regard to the infirmity of bodily strength and ability in the female, by rendering her incompetent for some offices and privileges, or incapacitating her from the discharge of the duties thereto belonging, cannot be questioned. Again, that she is subject to incapacities, from a presumed inferiority of discretion and judgment, seems also certain: a woman was not admitted as a witness in a case of villenage against a man; and the reason assigned is, because of "her frailty." *Fitz H. Ab., Villenage*, pl. 37. In *Jenkins's Centuries*, pp. 236, 237, at the end of the report of the case of *Bohun v. Duke of Buckingham*, in which there was a question as to the holding the office of High Constable of England, by a woman on whom it had descended, it is said by that very learned Judge:—"An office of inheritance, to which "a judicature is annexed, descends to two daughters as in this case "of the office of constable; after it has so descended it may be "exercised by deputy; but such an office cannot be originally granted "to any woman," for "*feminae non sunt capaces de publicis officiis*;" stating it as a maxim. And in most of the few cases of claims of women to exercise offices, this presumed inferiority of discretion and judgment will be found to have been an element of consideration. And, finally, there are incapacities and privileges of women, founded on reasons of decency and decorum, as in the case mentioned by *Litt.*, sec. 87. The law then regards the female as less worthy than the male; and she is subject to incapacities founded on inferiority of bodily ability, and on a presumed inferiority of discretion and judgment, and also on reasons of decency. And it seems certain that, for some or for all these reasons, women are excluded from certain offices, and from the exercise of certain rights, of which

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men are capable. It is very true that they have been held capable of certain offices to which some of these reasons would apply; but, in most all these cases, I think it will be found that their exclusion would have led to interference with some other fundamental law; as, for example, the law of descent; and the question would be, which of two rules of law was to give way; and which, of course, must be determined by the yielding of one or the other.

I come now to the particular privilege of taking part in the election of officers of public trust and government. I myself entertain no doubt that the weight of written authority is in favour of the position that women were incapable of voting for Members of Parliament and Coroners. This, however, has been questioned. But what I regard as infinitely more satisfactory and decisive to my mind than any *dictum* is, that, from the earliest records of the law, no case is to be found in which a woman's right to vote at an election to *any* office of public trust has been asserted and admitted in our Courts. The only case cited, that of *Olive v. Ingram (a)*, was expressly decided on the ground that the office did not concern the public, or the care and inspection of morals. I can conceive no more satisfactory evidence of the law on any subject of this kind, in which the occasions of raising the question have been innumerable. Even such cases as *The Queen v. Stubbs* are quite inconsistent with the notion of a general capacity in women for public offices, but seem very clearly to assume the contrary. The Court truly laid down that the incapacity was not absolute; and whether (if the office in that case was public) the distinction that the appointment to it was subject to the approval of the parties be or be not satisfactory, it shows the recognition of the general rule. In the case of *The Commissioners of Sewers* it may be observed, that an absolute unlimited discretion was given to the Crown. The existence of this state of things gives to such Acts as the Reform Act and the Municipal Corporation Act, which expressly excludes women as electors, an entirely different effect from what they might otherwise have, as exceptional legislation; because it shows that the qualification of "male" is introduced not

by way of exception, but by way of recognition of the existing state of things,—just as, in the Act before us, the introduction of the qualification of “full age” is only a recognition of the incompetency of infants.

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With respect to the office itself, of Town Commissioner, I can only say that, having read the 17 & 18 *Vic.*, c. 103, and the Acts incorporated with it, and having regard to the duties imposed on, and the powers of government thereby given to, Town Commissioners, if women could be admitted to such an office consistently with the reason and rules of the Common Law, I can see no office of government from which they could be reasonably excluded. Even if the Act did not show, as I think it does, an intention to exclude them, I should (I say it with deference) feel little difficulty in holding that they were excluded by the reason and rules of the Common Law. But when I find it clear from the Act itself, that one class of the persons eligible to the office must be males—that the person proposing the officer to be elected, and the person seconding such proposition, must be males,—I feel that the Legislature must have so far trusted to the discretion of the Judges who might interpret the Act, as to be sure that they would read the description of the other class or classes eligible, as excluding females. If it should be said that, annexing the qualification of “male” to the one class is itself an argument of intention that it should not be annexed to the other—I answer that it is no more so than the annexing of the qualification of “full age” to the one class is an argument that the Legislature did not intend it to be annexed to the other; and yet the same 25th section does annex it to one and not to the other.

I agree that the mere fact that Town Commissioners cannot be females, will not necessarily establish that females cannot have a right to vote at the election of such officers. But the establishing of that matter is not unimportant; because, if females were eligible to the office of Town Commissioners, I think the difficulty of contending that they were not capable of voting at the election of those officers would be very greatly increased; and because the establishing it makes the 25th section of the Act an instance of general

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words, capable of application to females, being confined to males; though here, I admit, by aid from the context. Of this there is, I think, another remarkable instance in the Act. It is clear that the twenty-one householders mentioned in the sixth section, on whose application to the Lord Lieutenant the Act may be put in force in a town, must be males. The first proceeding to be taken after such application, and its approval by the Lord Lieutenant, is the convening of a meeting at which persons having the qualifications mentioned in the seventh section are entitled to vote. At first sight there is the same reason for holding "those persons" to include females as exists with respect to the persons mentioned in the 22nd section. But the 6th section, in describing the convening of this meeting, refers to a schedule (schedule A), for the form of notice of convention, and in which the persons summoned are described as males only. No doubt, if this were done for the purpose and with the intention of imposing a new qualification on the persons mentioned, it might be a ground for contending that the non-existence of anything of the kind, with regard to the 25th section, showed that the Legislature in that section intended no such restriction. But it manifestly is done with no such purpose, but *aliâ intentione*, and is plainly an undesigned intimation of the Legislature's understanding of how the description of the persons in the seventh section ought to be construed.

Let us now, for the last time, consider the law antecedent to this statute as applicable to the right of women to vote in the elections to offices of public trust and government. If I be right, women were by Common Law incapable of voting at such elections. By the Municipal Corporation Act they are by express terms incapable of voting at the election of town councillors; and if I be right, such exclusion is but a recognition by the Legislature of their Common Law incapacity. Town Commissioners were in existence for towns not corporate under Acts previous to the one before us. Under the Act 9 G. 4, c. 82, it seems pretty clear that males only could vote at the election. The Act contains no interpretation clause; and words importing the masculine gender only are applied to the electors, and, in the absence of sufficient

reason to the contrary, must have their effect. The Act of 6 & 7 *Vic.*, c. 93, which alters in some respects the qualifications of electors under the Act of 9 *G.* 4, does contain an interpretation clause, by reference to the Municipal Corporation Act; but, singularly enough, that interpretation clause does not in terms apply to words importing the masculine gender only. Up, therefore, to the time of the Act before us, or of the Acts incorporated with it, the law—that is to say, the Common Law—recognised, as to offices of a similar kind, by the Municipal Corporation Act and the Act for appointing Town Commissioners, operated to exclude females as electors. I cannot persuade myself that the Legislature by implication, by the mere force of an interpretation clause in a general form now common to almost every Act, intended to alter this state of things, or that the statute should be construed without reference to the rule of the Common Law so plainly recognised in cases of the same kind. I am quite ready to admit that reasons founded on a presumed inferiority of women in understanding and discretion to men, are to be much more liberally dealt with now than they perhaps ever were. Altered states of society necessarily modify the application of all laws to some extent; for, in truth, the law would not continue the same if applied in the same way to an altered state of things. But, without holding any essential infirmity of women to men in judgment and discretion, I can have no doubt that in substance the reason of the Common Law still applies; and that the course of education and mental training to which women, happily for us and themselves, are subject, does render them far less fit than men for the administration of public affairs, and interference in the election to offices concerned in such administration.

Having regard to every one of the reasons of the Common Law, the subordination of sex, the inferiority of bodily ability, and the mental inferiority, in the sense explained, as well as to decency and decorum, I am not sorry that I am able, on the best consideration I have been able to give the case, to come to the conclusion that this judgment ought to be reversed.

T. T. 1864.
Exch. Cham.
THE QUEEN
v.
CROSTH-
WAITE.

T. T. 1864.

Exch Cham.

THE QUEEN

v.

CROSTH-

WAITE.

CHRISTIAN, J.

I am not ashamed to say that I have changed my opinion more than once during the argument of this case, and since; and even yet consider it to be one of extreme difficulty. But having heard the very vigorous and forcible argument of Dr. *Ball*, upon the last day on which we sat here—and still more, having heard the case now discussed by my two Brothers who have preceded me, in a manner which, I may take the liberty of saying, has been singularly persuasive and convincing,—I surrender my doubts to their arguments, and for my opinion adopt theirs. I concur with my two Brothers who have preceded me, that the judgment of the Court of Queen's Bench should be reversed; and I shall not attempt to do what I know I could not hope to do with any effect,—add anything to the reasons which they have assigned.

KROGH, J., concurred in the judgment of DEASY and FITZGERALD, BB., and in the reasons given by them.

BALL, J., delivered judgment for confirming the decision of the Court below.

FIGOT, C. B.

I concur in the conclusion at which my Brother BALL has arrived. I cannot give to the interpretation clause of the Town Improvement Act (17 & 18 Vic., c. 103) the construction suggested by the Counsel of the plaintiff in error. When the Legislature annexes to an Act of Parliament an interpretation clause, it prescribes, in peremptory terms, the meaning which the words interpreted are to bear; and it imposes on the Court the duty of expounding them according to that interpretation. When by the statute the Legislature enacts that "The following words are expressions in this Act *shall* have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction," and when it further enacts that "Words importing the masculine gender shall include females," I feel constrained to apply the legislation to both sexes, unless by my doing so there be something repugnant in the subject or context.

I do not consider that repugnancy to exist, merely because I myself, or any other, or all the Members of the Court, should hold the opinion, that to vote at the election of a Town Commissioner is inconsistent with the social position of women in the society in which we live, or with the proprieties and delicacies which we may suppose that it is desirable to encourage in the education and habits of women. Various opinions may be held on that subject. And I cannot recognise any opinion, however strong, of the propriety of withdrawing women from the function of voting for the appointment of a Town Commissioner, as constituting a sufficient reason for holding that the subject, or context, of the 22nd section of the Towns Improvement Act is repugnant to the exercising by women of the functions there prescribed.

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With respect to the *context*, it appears to me that the reasons given by my Brother BALL are perfectly conclusive to show that there is not, in the context of the 22nd section (the section with which we are dealing), anything repugnant to the construction which the interpretation clause gives to the words "him" and "her." Any attempt of mine to aid the reasoning of my Brother BALL on this topic would only tend to weaken it.

The only question that, as it appears to me, remains, upon which anything further can be usefully said, is, whether there is, in the *subject* (that is, the right of voting for the election of a Town Commissioner) a repugnancy to the exercise of that right by persons of the female sex.

Now I will not refer to the instances that have been enumerated in which women held offices of a public character; they are numerous: some of them have involved public duties of great importance. We know that a woman has held, and has exercised in person, the office of hereditary High Sheriff. I shall not refer to them in detail. But I am perfectly at a loss to understand the proposition—I can hardly embrace it—that there is a Common Law disability in women to exercise such functions as are necessary to the election of Town Commissioners. I cannot do that in a country in which it is part of the Common Law of the land, that a Queen may reign. Who is our present gracious Sovereign? A woman.

T. T. 1864.
Esch. Cham.

THE QUEEN
v.

CROSTH-
WAITE.

I cannot solemnly determine that a female is unfit, by reason of a Common Law disability, to vote in electing a Town Commissioner, while I administer law under a female Sovereign. I can conjecture how such an argument as this would have been received at a period of our history some three centuries nearer than the present to the fountains of our Common Law. I have looked into a rather curious Act of Parliament, as it bears upon the present case (an Act, be it observed, expressly declaratory of the Common Law), passed in the reign of a female predecessor of her present Majesty. It is that statute which, in order to remove any doubts upon the subject, *declares* the right of a female to succeed to the Crown. I find, there, not only a declaration of the Common Law, but a most indignant repudiation of the doctrine, that there is in females, by the Common Law, a disability to inherit the Crown of England. That Act (1 *Mary*, sess. 3, c. 1) recites that, "Forasmuch as the imperial Crown of this realm, with all dignities, honours, prerogatives, authorities, jurisdictions, and preheminences thereunto annexed, united and belonging, by the Divine Providence of Almighty God, is most lawfully, justly, and rightfully descended and come unto the Queen's highness that now is, being the very true and undoubted heir and inheritrix thereof, and invested in her most royal person, according unto the laws of this realm: and by force and virtue of the same, all regal powers, dignity, honour, authority, prerogative, preheminance, and jurisdiction doth appertain, and of right ought to appertain and belong unto her highness, as unto the Sovereign supream Governor and Queen of this realm, and of the dominions thereof, in as full, large and ample manner as it hath done heretofore to any other her most noble progenitors, Kings of this realm: nevertheless, the most ancient statutes of this realm, being made by Kings then reigning, do not only attribute and refer all prerogative, preheminance, power and jurisdiction royal unto the name of King, but also do give, assign and appoint the correction and punishment of all offenders against the regality and dignity of the Crown, and the laws of this realm unto the King, by occasion whereof the malicious and ignorant persons may be hereafter induced and

“persuaded unto this error and folly, to think that her Highness
 “could ne should have, enjoy and use such like royal authority,
 “power, preheminance, prerogative, and jurisdiction, nor do ne
 “execute and use all things concerning the said statutes, and take
 “the benefit and privilege of the same, nor correct and punish
 “offenders against her most royal person, and the regality and
 “dignity of the Crown of this realm and the dominions thereof, as
 “the Kings of this realm her most noble progenitors have heretofore
 “done, enjoyed, used and exercised.” The statute then proceeds:—
 “For the avoiding and clear extinguishment of which said Errors
 “and Doubts, and for a plain declaration of the Law of this Realm
 “in that behalf: Be it declared and enacted.” Then follows the
 provision that all “dignities, prerogatives royal, power,” &c., be-
 longing to the Kingly office shall be had and exercised by a Queen,
 being the inheritrix of the Crown.

T. T. 1864.
Exch. Cham.
 THE QUEEN
 v.
 CROSTH-
 WAITE.

The reign of that Queen was followed by that of Queen Elizabeth,
 of whom Lord Plunket said, that no monarch ever better knew the
 royal art of reigning. The intervening reigns of Queen Mary
 (consort of William the Third), and of Queen Anne, have been now
 followed by that of another female Sovereign, not less illustrious
 than any of her predecessors,—her present Majesty. I cannot hold
 that, in this realm, in which a female not only may reign, but
 does reign, in her own right, there is in women a Common Law
 disability arising out of mental incapacity.

A number of instances have been referred to—some founded
 upon long-established usage, some enacted by the express terms
 of Acts of Parliament,—showing, that women do not exercise a
 variety of functions which are exercised by men. With respect to
 the elective franchise, we are all aware that, in counties, it was
 originally enjoyed by the freeholders, who were required, attending
 at the Sheriff's court, to return knights of the shire to Parliament.
 It was not until comparatively recent times, that statutes were
 passed regulating the freehold franchise; and those Acts, from the
 very first of them, expressly named the sex of the persons by whom
 the franchise was to be enjoyed. This was plain and express legis-
 lation, including one sex, and so excluding the other.

T. T. 1864.

*Exch. Cham.*THE QUEEN
v.CROSTH-
WAITE.

With respect to cities and boroughs, they had enjoyed franchises still more ancient than that of electing representatives in Parliament; and the election suffrage was a privilege superadded to the franchises previously enjoyed by the citizens and burgesses of cities and towns. For feudal reasons, the freeholders, for reasons connected with the enfranchisement of cities and boroughs, the citizens and burgesses were men. But I see no reason to infer that those ancient privileges were founded, at all, upon the presumed mental incapacity of females. On the contrary, I believe the exemption arose, in a great degree, from their physical incapacity to perform the duties which were expected from freeholders doing military service, and from burghers defending their towns in troubled times. The Council of the Sovereign, before the election of representatives, or the division of the parliamentary assembly into separate houses, were composed of men—the barons, and the tenants of the Crown. When representatives were elected, they were of the same sex as the other members of the great Council of the Realm. Accordingly, the House of Commons is composed of knights, citizens, and burgesses. Naturally, they were elected by persons of their own sex. And we can perfectly understand, that the general sense of the whole community, when the early statutes regulating the franchise were passed, as well as now, and then even more than now, was opposed to the engaging of women in matters so foreign to their domestic habits and duties, and to the more delicate and gentle qualities which were expected from them in social life, as the agitation and turmoil of parliamentary elections. But this withdrawing, by express legislation, of women from scenes of turmoil and agitation, cannot warrant us in holding, that there is in women, at Common Law, a disability, by reason of presumed mental incapacity, which prevents them from voting in the election of persons having the power of imposing local taxes. No statute has so enacted. No decision of any Court has affirmed the incapacity of women for transacting matters of that nature. Several *dicta* have been cited; but they are mere *dicta* of individual Judges. And I am not aware of any decision—certainly none has come within my own observation, and none has been cited at the Bar,—in which the

incapacity of women to discharge functions analogous to these, has been pronounced by a Court of Law. In the statutes which have been referred to, the exclusive privileges or duties of men have been prescribed by express enactment. So far from regarding these Acts as indicating any general rule of law adverse to the mental capacity of women, it appears to me that they rather indicate that the general rule was the other way; and that the Legislature, when they came to deal with functions which they conceived to be not in accordance with the habits, the duties, and the position in society of women, deemed it necessary to exclude them, by direct and express legislation, from the exercise of those functions in which they determined that women should have no share. Coming down to the most recent legislation on the subject, we find a statute, under which it is matter of notoriety that women have exercised functions exactly analogous to those from which, in the present case, it is contended that they ought to be excluded. By the Poor-law Act, 1 & 2 Vic., c. 56, by section 80, or section 81, or by both, the power is conferred of voting for the election of poor-law guardians. By the interpretation clause (section 124) words importing the masculine gender only are, by express enactment, to be construed as including females, unless the context excludes that construction. By force of that glossary, and without anything in the context indicating the opposite construction, it would seem plain that women had the right to vote in the electing of poor-law guardians; and it is a matter of public notoriety that they have, in point of fact, voted at such elections. That Act was passed in the session holden in the first and second years of her Majesty's reign. It has been in operation for upwards of twenty years. It has been frequently under the consideration of the Legislature, and it has been amended by them. And though women have, during that time, been exercising the power of voting thus conferred, the Legislature have never thought fit to withhold that privilege from them. It appears to me that the existence of that statute, acted upon in that manner, without any legislative interference, though the statute has been repeatedly under the consideration of Parliament, and though in more than one instance the Legislature has dealt with the quali-

T. T. 1864.
Exch. Cham.

THE QUEEN
v.
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T. T. 1864.
Exch. Cham.
THE QUEEN
v.
CROSTH-
WAITE.

fications of the voters, and the mode of electing poor-law guardians, furnishes a strong argument against the doctrine for which the Counsel of the plaintiff in error has contended, it appears to me to go far to repel the supposed presumption, as a presumption sanctioned by the laws of England, that women are under a mental incapacity, inconsistent with the exercise of such a function as that of voting for the election of either a poor-law guardian or a town commissioner. Poor-law guardians, within their sphere, exercise powers of governing, and powers of local taxation.

In the context of the 22nd section of the 17 & 18 *Vic.*, c. 103, there is, in my opinion, nothing to prevent the application to it of that part of the interpretation clause which deals with males and females.

In the subject-matter of that section there is, in my opinion, nothing inconsistent with such application of the interpretation clause. Between that subject-matter and the exercise of the power of voting for poor-law guardians, there appears to me to be an analogy, almost as close as any that can exist between any two subjects of legislation. I cannot bring my mind to the conclusion that we are at liberty to construe this Act otherwise than as its words plainly import, or to interpret the express legislation of the glossary as if these words had a flexibility that enabled the Court to mould and apply them according to the mere opinions of Judges, as to the delicacies or proprieties of the female character, or as to the expediency or in expediency of conferring functions of this kind upon women.

I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

MONAHAN, C. J.

During the argument, and since its termination, I have considered the case with all the attention in my power, and have come to the conclusion that, so far as regards the terms of the 22nd section, the words are large enough to give women the right to the franchise. The only words in that section which at all afford an argument against the admission of women to the franchise are

those which, in the latter part of it, provide that the franchise shall be confined to such persons as shall have paid "all such rates payable by him," &c. On turning, however, to the interpretation clause, I find it enacted in terms that words importing the masculine gender shall include females, unless there be in the subject-matter or context something repugnant to such construction. Really, therefore, the question that we have to consider in the present case is this:—Is there, or is there not, in the context or subject-matter of this Act, any repugnancy sufficient to exclude from the exercise of the franchise those who, by the express terms of the Act, should otherwise get it? I have really been unable to form any very decided opinion on the subject; but my impression is this, that there is not any such repugnancy, and that the decision of the Court of Queen's Bench is justified by the terms of the Act, though very possibly such a result was not intended by the Legislature. According to a well-settled principle of law, if I am unable to satisfy myself that the judgment appealed from is erroneous, I am bound to affirm it; and therefore, in my opinion, the judgment of the Court of Queen's Bench in the present case should be affirmed. However, that decision will of course be reversed, the majority of this Court being of opinion that it is erroneous. The order will be, that the judgment of the Court below be reversed; but, as we are reversing the decision of the Court below, the parties will bear their own costs of the proceedings in this Court.

T. T. 1864.
Exch. Cham.

THE QUEEN
v.
CROSTH-
WAITE.

T. T. 1864.
Exch. Cham.
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 v.
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 WAITE.

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T. T. 1864.
Exch. Cham.
THE QUEEN
v.
CROSTH-
WAITE.

H. T. 1866.
Exch. Cham.

REGINA v. CROSTHWAITE.*

Jan. 16.

A consent to submit a case to the Court of Queen's Bench provided that if, "by the decision of the Court, &c., then the defendant is not legally entitled, and judgment is to be entered for the said relator with costs;" and, if the Court were of a contrary opinion, "judgment is to be entered for the said defendant with costs;" and either party might bring error upon the judgment of the Court upon this special case. The Queen's Bench decided for the defendant; the Exchequer Chamber for the relator. No judgment was made up.

Held, that the relator should have costs in the Court of Queen's Bench, both parties to abide their own costs in the Exchequer Chamber.

THIS Court had reversed the decision of the Court of Queen's Bench in this case, and decided in favour of the relator, in June 1864; but the judgment had not since been made up.

Curtis (with *J. T. Ball*), for the relator, now applied for "an order, that the proper officer be directed to make up the judgment of reversal in this cause, so as to give the said relator his costs in this cause, as provided for by the special case submitted to, and now of record in the Court of Queen's Bench." No doubt the general rule in Crown cases is, not to give costs to either side; but this is not a question between the Crown and a subject: it is simply one between the relator and the defendant. The 3 & 4 *Vic.*, c. 108, s. 50, gives costs in cases relating to corporations. I do not contend that this is within that Act; but I rely on the words of the consent, which was drawn up between the relator and the defendant. The consent concludes "that if, by the decision of the Court," &c. "then the defendant is not legally entitled," &c., and "judgment *is to be entered for the said relator with costs*; and, if the Court should be of opinion that the said defendant was," &c., "*judgment is to be entered for the said defendant with costs*; and it is further agreed that, either the said relator or the said defendant may bring error upon the judgment of the Court upon this special case." This is an agreement framed pursuant to the Common Law Procedure Act 1853 (16 & 17 *Vic.*, c. 113, s. 93).—[*Pigot*, C. B.] It would be well to consider the principle as to the ground on which writ of error lies to this Court in Crown cases, and not directly to the

* *Coram* MONAHAN, C. J., *Pigot*, C. B., *CHRISTIAN*, J., *FITZGERALD*, *HUGHES*, *DEASY*, BB., and *O'HAGAN*, J.

Crown.—MONAHAN, C. J. No doubt, the 20 & 21 Vic., c. 6, H. T. 1866. properly brought this case into this Court; but I do not recollect ^{Exch. Cham.} a similar case in this Court since I have been sitting in it.—
 PIGOT, C. B. Who are the parties, the Crown or the relator? THE QUEEN
 v.
 CROSTH-
 WAITE.
 The words of this agreement are, "judgment for the relator." I think no judgment can be given for the relator.]

Heron, for the defendant, cited *Waller v. O'Grady*, which was a writ of error in 1816, where judgment was given without costs. The last clause of the agreement shows that the point about costs does not apply to the proceedings in this Court; and, though error is made a step in the cause, no costs can be given without the agreement. *Fisher v. Bridges* (a), *Young v. Millen* (b), and *Keyes v. B. and B. Railway Company* (c), show that, though error is a step in the cause, it is not in the nature of a *continuendo*.—[MONAHAN, C. J. Has the judgment in the Court of Queen's Bench been made up?—No.—[MONAHAN, C. J. Then this is an appeal, not a writ of error; no writ of error could lie till the judgment had been made up].

Per Curiam.

Enter an order reversing the order of the Queen's Bench, and that judgment be entered up for the relator, with costs in the Court of Queen's Bench; both parties to abide their costs in this Court.

(a) 4 Ell. & Bl. 666.

(b) 6 Ell. & Bl. 681.

(c) 9 H. of L. Cas. 576.

H. T. 1865.
Exch. Cham.

JOHN THOMPSON

v.

BENJAMIN ROBERTS and WILLIAM MORGAN.*

Jan: 16, 20.

Action against sureties of one A. R., under a bond which recited that said A. R. had been taken into service and employment of the B. Banking Co. as a writing clerk; said bond to be void if said A. R., during his continuance in the service and employment of the Co., duly discharged the said service, and "all and every other service of said Co. wherein he is, shall, or may be employed;" and should, whenever required, account for all moneys, notes, bills, bonds, &c., which, in the said service or employment, should come into his hands, and make good the balance of such account; and should, at the expiration or other determination of said service or employment, hand over all moneys, &c., and keep the said Co. indemnified against all loss; said A. R. to remain in the employment of the said Co. for three years; subject to discharge for misconduct. After said three years, said sureties to have power to withdraw, by giving three months' notice in writing; said A. R. to have like power to terminate his engagement.

The plaint set out several breaches by A. R.

Defence—That, after three years elapsed, A. R. ceased to be a writing clerk, and was, without the consent of the defendants, appointed cashier of a branch bank of said Banking Co., and in that capacity committed the alleged breaches. Demurrer thereto.

Held—reversing the decision of the Queen's Bench, and allowing the demurrer—(MONAHAN, C. J., and PICOT, C. B., *dissentientibus*).—that the recital did not control the words of the condition, and that the defendants' liability continued while A. R. was employed in the service of the Co., and no notice of withdrawal was given.

* *Coram* MONAHAN, C. J., PICOT, C. B., KEOGH and CHRISTIAN, JJ., FITZGERALD, HUGHES, and DEASY, BB.

"deliver, in writing, a just and true account of all moneys, notes,
 "bills, bonds, securities for money, tallies, orders, papers, writings,
 "books, goods and effects whatsoever, which, in the said service or
 "employment, shall come to the hands of the said Alexander Roberts,
 "or which he shall be entrusted with by or on account of the said
 "Company; and also shall make good, answer for, and pay to the
 "said Company, and to the directors, &c., the money due on the
 "balance of such account; and shall, at the expiration, discontinu-
 "ance, or other determination of his said service or employment, or
 "when he shall be thereunto required, hand over and deliver the
 "said moneys, &c., then in his hands or custody; and shall and will
 "moreover well and sufficiently save harmless, and keep indemnified
 "the said Banking Company from and against all losses, damages,
 "actions, suits, costs, charges and expenses which may be sued,
 "commenced, or prosecuted, or which the said Company may bear,
 "sustain, or be put unto, for or by reason or means of any matter,
 "cause or thing whatsoever committed, neglected, omitted or suffered
 "to be done by the said Alexander Roberts in or during his said
 "service or employment,—then this obligation, &c. And it is agreed
 "that the said Alexander Roberts shall remain in the employment of
 "the said Belfast Banking Company for three years certain, subject
 "to the right of discharge for misconduct; that the said sureties
 "may, after said three years, withdraw their liability, by giving to the
 "directors three months' previous notice in writing; and that said
 "Alexander Roberts may leave his said employment, by giving
 "a like notice, at any time after the expiry of said three years,
 "but not otherwise."

H. T. 1865.
Exch. Cham.
THOMPSON
v.
ROBERTS.

Alexander Roberts remained some years in the position of a
 writing clerk, and was then promoted to that of cashier of a branch
 bank. In that position he embezzled £5000, and absconded on the
 21st of February 1863. The plaint contained four breaches. The
 defendants filed separate defences. Benjamin Roberts pleaded, that
 "at the time," &c., "the said Alexander Roberts was in the
 "service and employment of said Company as a writing clerk, and
 "not in any other service or employment; and saith that the said
 "Alexander Roberts continued in such service or employment, as
 "such writing clerk, for a considerable time after the execution of

H. T. 1865. *Esch. Cham.* "said writing obligation; and that no breach," &c., "occurred
 THOMPSON v. ROBERTS. "during said time; and afterwards, to wit, in the year 1861, before
 "any breach took place, the said Company discontinued said service
 "and employment of the said Alexander Roberts as a writing
 "clerk in said Company; and the said Alexander Roberts there-
 "upon, and before any breach took place, wholly ceased to be such
 "writing clerk; and said Company thereupon, without the consent
 "of this defendant, appointed the said Alexander Roberts to be
 "cashier, and placed him in the Ballymena branch of the Company,
 "and without such consent altered and greatly increased the duties,
 "risks and liabilities of the said Alexander Roberts, which, as such
 "cashier, were other and wholly different from and greater than
 "the duties," &c., "of the said Alexander Roberts, and to which he
 "was subject at the time of the execution by this defendant of the
 "said writing, or which were in the contemplation of this defendant
 "when said writing," &c., "or which were within the true intent
 "and meaning of the suretyship of this defendant under said
 "writing; and said breaches took place after said appointment, and
 "after a period of three years had elapsed."

The second plea of William Morgan was the same as that of Benjamin Roberts, except that it omitted the averment that the removal of Alexander Roberts to Ballymena was without the consent of the defendant. To these defences the plaintiff demurred. The points noted for the demurrer to Benjamin Roberts' defence were:—First; that said bond was binding during the continuance of the said Alexander Roberts in any service of the Company. Secondly; because, though it is averred that the period of three years elapsed, it is not averred that Benjamin Roberts withdrew his liability by giving three months' notice in writing. In addition to these points, there were noted for demurrer to the defence of William Morgan:—Thirdly; that no averment that the appointment to the office of cashier was without the knowledge or consent of the said defendant Morgan. Fourthly; that no averment that Alexander Roberts performed his duties as cashier, and no traverse or confession and avoidance of the breaches. The Court below having over-ruled both demurrers, the plaintiff brought error.

Serjeant *Armstrong* (with him *Thomas M'Donnell* and *R. Carson*), for plaintiff. H. T. 1865.
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The words "all and every other services" show that other duties besides those of writing clerk were in the contemplation of the parties: *Lord Arlington v. Merricke* (a). Roberts was acting as writing clerk before the bond was executed. It must have been with a view to his appointment to other things that this security was perfected. Is it to be contended that there was to be no course of promotion for Roberts as in the usual routine of such an establishment? The words "said service of writing clerk" are sufficient to point out the duties annexed to that without anything further: *Sanson v. Bell* (b); *Oswald v. Mayor of Berwick-on-Tweed* (c); *Anderson v. Thornton* (d); *Liverpool Waterworks Co. v. Atkinson* (e).

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Battersby (with him *O'Driscoll*), for Benjamin Roberts.

The condition should contain certain, express, and unambiguous words to include anything else than the service of writing clerk. "Said service" refers to that of writing clerk all through. "Other services" means services of another kind while in the position of a writing clerk. It was restricted to the time he was such writing clerk. If it were not such incidental services, there should be some description of what services were intended: *Blest v. Browne* (f); *The Wardens of St. Saviour's v. Bostock* (g); *Peppin v. Cooper* (h); *Bamford v. Iles* (i); *Pearsall v. Summersett* (k); *Mayor of Cambridge v. Dennis* (l); *Bonar v. M'Donald* (m); *North Western Railway Co. v. Whinray* (n); *Anderson v. Thornton*; *Angers v. Keen* (o); *Oswald v. Mayor of Berwick*. In *Pybus v. Gibb* (p)

(a) 2 Wms. Saund. 403.

(c) 5 H. of L. Cas. 856.

(e) 6 East. 507.

(g) 2 N. R. 175.

(i) 3 Exch. 380.

(j) 11 B. & El. 660.

(n) 10 Exch. 77.

(b) 2 Camp. 39.

(d) 3 Q. B. 271.

(f) 8 Jur. 602.

(h) 2 B. & Ald. 431.

(k) 4 Taunt. 593.

(m) 3 H. of L. Cas. 226.

(o) 1 M. & W. 10.

(p) 6 Ell. & B. 902.

H. T. 1865. a plea that, after appointment functions of the principal were
Exch. Cham. changed, was held good. There is no statement in the bond to alter
 THOMPSON the original statement that the appointment intended was that of a
 v. writing clerk. The words are too general to extend the service.—
 ROBERTS. [MONAHAN, C. J. Do not the words "is, shall, or may be em-
 ployed" include any future change? FIOR, C. B. There is this
 also, "said service" is always in the singular, in contrast to
 "services."]

Harrison (with him *Hamill*), for Morgan, second defendant.*

If the office of cashier was in the way of promotion, it should be shown that the duties imposed were strictly within his province as cashier. If the words as to bills and notes were omitted, no one could contend that the condition was enlarged; but in establishments of this kind it may be often necessary to call on the ordinary clerks to discharge certain duties relating to bills, &c., not strictly within their province as writing clerks; to send them out to collect a bill, for instance. May not the word services apply to these incidental duties? Can it be supposed that the sureties really contemplated giving security for a cashier? *Bartlett v. The Attorney-General* (a). In *Napier v. Bruce* (b) agency is controlled by the recital. *Hassell v. Long* (c).

Hamill, on the same side.

Armstrong, in reply, cited *Hargreave v. Smee* (d).

DEASY, B.

Jan. 20. This is an action on a bond, executed by the defendant Roberts to the plaintiffs, directors of the Belfast Banking Company; and the question is, whether there has been any breach of the condi-

(a) *Parker*, 277.

(b) 8 C. & F. 470.

(c) 2 M. & S. 370.

(d) 6 Bing. 244.

* The Court refused to hear two Counsel for each defendant. MONAHAN, C. J., mentioned the case of *The Queen v. O'Brien* (2 H. of L. Cas., 472), where the House of Lords heard three Counsel, one senior for each, and a junior, according to arrangement.

tion of the bond which entitles the plaintiffs to recover? The defendant Benjamin Roberts executed the bond as a surety for a person named Alexander Roberts, who was then in the service of the Bank as a writing clerk, and who is alleged to have embezzled a large sum of money, the property of the Bank, for a portion of which, amounting to the penalty of the bond, the Bank seek to make the defendant liable. This defence in substance is that, before any breach of the condition of the bond by Alexander Roberts, the Bank ceased to employ him as a writing clerk, and appointed him cashier of one of their branches, by which his responsibilities were greatly increased, without the consent of the defendant. To this the plaintiffs have demurred. The Court of Queen's Bench overruled the demurrer. From their judgment the present writ of error has been brought; and the question for us is, the validity of that defence. That depends entirely upon the construction of the condition of the bond; and that is, whether that condition is confined to breaches of duty committed while the principal continued in the service of the Bank as a writing clerk; or whether it extended to and comprised breaches of duty committed while he was in the service of the Bank generally. Notwithstanding the unanimous decision of the Court of Queen's Bench, and the opinion of some of the Members of this Court, to the contrary, I have formed so clear an opinion that the sureties are liable for the breach of duty of their principal, that neither distrust of the soundness of that opinion, nor deference to the opinion of the number of Judges who entertain a different opinion, ought to prevent me from expressing it, and giving my reasons for it. The condition of the bond recites that A. Roberts had been taken into the service and employment of the Bank as a writing clerk; and the argument for the defendant is, that that recital controls and justifies all the subsequent expressions in the condition, so as to confine them to breaches of duty committed while the principal continued in that particular office. A great number of cases were cited or referred to in the argument, beginning with *Arlington v. Merriche* (a) and going down to *Oswald v. Mayor of Berwick* (b). Now, there is no

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(a) 2 Wms. Saund. 403.

(b) 5 H. of L. Cas. 856.

H. T. 1865. doubt that general words in the condition or covenant may be controlled or qualified by the recital, if such appears upon the whole instrument to be the intention of the parties as expressed in it. But
Exch. Cham.
 THOMPSON v. ROBERTS. it is entirely a question of construction, in each case, to be decided upon the language used; and there is no particular rule of construction applicable to cases of bonds executed by sureties, as distinguished from other instruments. The Court is to ascertain, from the words of the instrument, what was the intention of the parties—what were the limits of the liability incurred, both as to duration and as to extent? Thus, Alderson, B., in *Oswald v. Mayor of Berwick* (a), says:—"But then, according to the case of *Arlington v. Merricke* (b), coupled with, and explained by the case of *The Liverpool Waterworks Company v. Atkinson* (c), the responsibility which, according to the first of those cases, would have been confined to the period limited by the first election, may be increased in its duration by the words of the covenant, if their reasonable and proper construction will warrant it." Lord Cranworth (then Lord Chancellor) says [page 871]:—"It has been contended, upon the authority of a well-known case in *Saunders's Reports*, that, where a person has been elected to an office, and has given a bond with sureties only to discharge the duties of that office, if it appears by the recital of the bond that that officer was an annual officer, and he was re-elected, and continued in the office after that year, neither of the sureties was bound; nor could the party himself be bound by virtue of his bond." But that case turned upon the particular nature of the recital. The recital in that case was, that the party had been appointed a postmaster for the space of six months; and there the bond was conditioned upon his duly performing the duties of the office so long as he should continue postmaster. It was held, upon very intelligible grounds, that that meant so long as he shall continue postmaster according to the recital, namely, that he had been appointed for six months,—that is to say, it bound the parties for the whole six months, whether he continued in office for the whole of that period, or only for a part of

(a) 5 H. of L. Cas. 856.

(b) 2 Wms. Saund. 403.

(c) 6 East, 507.

it. But when the six months came to an end, and he was re-elected, then the recital shows that the persons then bound did not mean to be bound for a future election, because, looking at the true construction of the instrument, all the parts being taken together, it is clear that what they meant, to bind themselves for was, for the holding of office during the time mentioned in the recital. Now, applying that principle of construction, which is that applicable to all other instruments—that is, looking to all the parts of it taken together—what was the extent of liability intended by the Bank to be imposed, and by the obligors, principal and surety, to be accepted? Was it to be confined to the continuance of the then services of Alexander Roberts as a writing clerk; or does it include defaults committed by him while in the employment of the Bank in any other capacity? The recital is, that he had been taken and admitted into the service and employment of the Bank as a writing clerk; and those words “service and employment” are repeated several times, and in a manner which indicates that they were used in a general sense, and not confined to any particular service, office, or department. Then the condition is, “that if he, A. Roberts, shall, during his continuance in the service or employment of the Bank,”—words wide and general in their nature and scope, but capable, perhaps, of being limited by the antecedent recital, if they had not been followed by the words which express the extent of obligation which, during such service or employment, was to be imposed, as well on the principal as upon the surety, and which, in the words of the condition, are stated to be, “faithfully, honestly, diligently, and carefully discharge the said service, and all and every other service of the “Company, wherein he is, shall, or may be employed.” I find it impossible to give to those latter words any meaning but this, that during the continuance of A. Roberts in the service of the Company, he and his sureties were to guarantee and be liable not only for the discharge of his duties as a writing clerk, but for any other duties which, during the continuance of such service, should be imposed upon him. It was said that those words would be satisfied by confining them to the performance of duties *extra* those of a writing clerk, imposed on him while he still continued such writing

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clerk. But what is there in the words to warrant such a limitation? Once you go beyond the limits of the duties of a writing clerk, and admit, as the Counsel for the defendant were obliged to admit, that those words necessitate your going beyond them, there is nothing in the language of the instrument to warrant you in adopting any other limit save the continuance of the person whom the defendant became surety for in the service of the Company. Neither is there any additional liability imposed upon the sureties; for the Company might continue their liability, by nominally retaining the principal in their employment as a writing clerk, and superadd to that the duties and liabilities of a cashier, instead of doing as they have done in the present case, release him from his duties as writing clerk, and appoint him to the office of cashier. That construction is strengthened by the subsequent parts of the condition; for the next branch is, that he shall, when required, deliver in writing a just and true account of all moneys, &c., "which in the said service or employment shall come to his hands, or which he shall be entrusted with on account of the said Company." The words "said service or employment" there manifestly refer to the previous words "during his continuance in the service or employment of the Company." Then comes the third branch of the condition, which is, that he "shall, at the expiration, discontinuance, or other determination of his said service or employment, or when he shall be thereunto required, hand over the said moneys so then in his hands or custody." There, again, referring back to the service or employment of the Company which he had been taken into, and his continuance in which was contemplated and provided for by the antecedent parts of the condition. In like manner, in the fourth branch of the condition, he is to save harmless the Company from all losses, damages, &c., which they may sustain, by reason of anything committed, occasioned, neglected, or suffered to be done by him, "in or during the said service or employment." The words "service or employment of the Company," when they are used first are used generally, without any reference to the particular service of a writing clerk, in which capacity the principal had been

admitted ; and in the three succeeding passages, in which the same words are repeated, they are accompanied by a word of reference which affixes to them the same sense as that in which they were used on the first occasion. That they were not used with reference to, or understood as restricted by the particular service which the principal then discharged is, I think, plain from the fact that, where what is obviously intended to be referred to is called "the said service" simply, and it is contradistinguished from other services of the Company which the principal might be employed in, the concluding part of the instrument, I think, strengthens the construction which I have put upon the antecedent part ; for by it it is agreed that the principal shall remain in the employment of the Company for three years certain, subject to right of discharge for misconduct ; and that the sureties might after said three years withdraw their liability, by giving to the directors three months' previous notice in writing. This, I think, is a strong indication of an intention that, during the continuance of the limit of time thereby fixed, the sureties were to continue liable for any default of the principal in the Bank, whatever capacity he might be employed in during the period thereby fixed.

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HUGHES, B.

The recital here does not purport to express the object of the parties : it only states a fact ; and therefore it cannot control the words in the instrument that do express the object. Those words that do express the object of the parties admit of no doubt. They provide for the liability of the sureties, while the principal was continued in the employment of the Company, generally. I think the demurrer ought to be allowed.

FITZGERALD, B.

Upon the best consideration I have been able to give this case, I find myself obliged to concur with my Brother DEASY, in holding that the judgment of the Court of Queen's Bench ought to be reversed. There is no doubt that the defendants agreed to guarantee the faithful discharge of his duties, by their principal in the bond, while in the service and employment of the Banking Com-

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pany as a writing clerk. The single question is, whether they have agreed to guarantee his faithful discharge of duties while he continued in the service or employment of the Company, though during such continuance the nature of his employment was altered? It is not alleged by the pleas of the defendant that the principal ceased before breach to be in the service or employment of the Company. Though it is averred that his employment as writing clerk ceased, and that he thereupon was appointed manager of one of the branch Banks of the Company, it is not stated that there was any interval of time during which he was not in the service or employment of the Company. The question is one of the construction of the condition of the bond executed by the sureties. That condition is preceded by a recital, "that the above bounden Alexander Roberts hath been "taken and admitted *into the service and employment* of the above-named Belfast Banking Company, for the time being, *as a writing clerk.*" The main contention of the defendants has been, that this recital governs the subsequent language of the condition, and limits its application to the conduct of the principal in that particular employment. I think it must be conceded that the recital does not show that any change of employment was in the contemplation of the parties. And that being so, I can understand that the introduction of the recital might form a fair ground for limiting the application of general words which were capable of a sensible meaning, as applied to that employment only. On the other hand, I do not think that the recital is inconsistent with the intention of providing for the case of a change of employment during the continuance of the principal's service. On the contrary, I think the recital is quite consistent with such an intention, though it does not show such intention. That being so, I do not think that the recital can control language otherwise perfectly clear, if such there be in the condition, which shows the intention of providing for a change of employment. The condition then proceeds to provide that "if, "during the principal's continuance in the service or employment "of the said Company." Not, it will be observed, as "writing clerk," nor even "in the said service or employment," but—"if, "from time to time, and at all times hereafter, during his continu-

“ance in the service or employment of the Company, he shall
 “faithfully execute, perform, and discharge the said service, and all
 “and every other services of the said Company, wherein he is, shall
 “or may be employed,” and soforth. I confess, I think, the plain
 and obvious meaning of these words is, that the obligation of the
 parties bound shall extend not merely to the service in which
 the principal then was employed, viz., that of writing clerk, but to
 all and every other service in which he might hereafter conti-
 nuously be employed by the Company. Nor do I think that the
 words admit of any sensible meaning, as confined to his employment
 or service of writing clerk. It was indeed suggested in the argu-
 ment that, according to law, even though he continued writing
 clerk, yet, if any alteration of his duties took place, increasing
 or affecting the risk of the sureties, they would be discharged,
 unless words of this kind had been introduced; and that a change
 of this kind, while the service or employment of writing clerk conti-
 nued, was the thing intended to be provided for, and not a total
 change of the employment. But this appears to me to be the
 concession of the whole case; for the very ground of the discharge
 of the sureties in the case supposed is, that there has been an
 essential change of the employment. *Bonar v. M'Donald* (a)
 belongs to this class of cases, as well as the case cited from *Parker*;
 and the substance of that case, and the principle on which it
 was decided, are thus briefly and clearly stated by Lord Campbell,
 in his judgment in *Pybus v. Gibb* (b). I cite from page 913:—
 “It was not,” he says, “the case of an office, but of an employ-
 “ment; fresh duties had, without the consent of the surety, been
 “added to the employment; and then the principal made a de-
 “fault that was within the scope of his original employment. It
 “was argued there, as here, that the liability should be the same
 “as before; but the House of Lords, affirming the judgment below,
 “held that, after the addition of fresh duties, *the employment was*
 “*essentially altered*, and the sureties discharged.” To say then
 that the parties contemplated the imposition of fresh duties, is
 only to say, in other words, that they contemplated an essential

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(a) 3 H. of L. Cas. 226.

(b) 6 El. & B. 902.

H. T. 1865. change of the employment; and, if so, it seems wholly immaterial
Exch. Cham. whether it be or be not called by the same name. I read the
 THOMPSON recital as stating that "the principal is now employed by the
 v. Company in the service of writing clerk;" and then I read the
 ROBERTS. condition as guaranteeing his good conduct "in the said service
 "in which he now is employed by the Company, and all and any
 "other services in which he shall or may be employed," reading
 the words distributively. This seems to me the only fair intelli-
 gible meaning of the words.

CHRISTIAN and KEOGH, JJ., concurred in reversing the judg-
 ment of the Court of Queen's Bench.

PIGOT, C. B.

The principle which has governed the decisions in that vast
 multitude of cases which have been decided in reference to con-
 tracts made with employers for indemnity against the defaults of
 their servants, from the case of *Lord Arlington v. Merricke* (a)
 down to *The Wardens of St. Saviour's v. Bostock* (b), *Peppin v.*
Cooper (c), and *Pearsall v. Summersett* (d), and the still more re-
 cent cases of *Bamford v. Iles* (e), *The North Western Railway*
Company v. Whinray (f), *Napier v. Bruce* (g), and *The Mayor of*
Cambridge v. Dennis (h), is simply this—that a recital, showing
 the nature of the office, shall be applied as a key to the con-
 struction of the subsequent words of obligation or contract; and
 that, when these words are general and indefinite, and capable of
 a large or a restricted meaning, they shall be controlled by the
 recital, and shall not bind the party contracting to indemnify for
 acts of the servant not done in the execution of the recited office,
 unless the words so used plainly show that such was the intention of
 the parties. If they do plainly show that intention, then the inten-
 tion so shown must govern. This is a principle of construction not

(a) 2 Wms. Saund. 403 a.

(c) 2 B. & Ald. 431.

(e) 3 Exch. 380.

(g) 8 Cl. & Fin. 470.

(b) 2 N. R. 175.

(d) 4 Taunt. 593.

(f) 10 Exch. 77.

(h) EL., B. & EL. 660.

confined in our law to such contracts of indemnity alone. It applies to the construction of other instruments. A familiar example is that of releases. In such an instrument, the recital controls and limits, to the purposes recited, general words of release which follow the recital: 2 *Roll. Abr.*, tit. *Release* (A), pl. 3; *Knight v. Cole* (a); *Braybrooke v. Inskip* (b); *Payler v. Homersham* (c). So, in reference to the common case of covenants for title, where restrictive words are used in the first of a series of several covenants having the same object, they will be construed as extending to all the covenants, though they are distinct.—See the cases collected in *Sugden on Vendors and Purchasers*, p. 493 (ed. of 1857). In *Walsh v. Trevanion* (d) the defendant contended that general words in a deed were not controlled by the recital and other parts of the deed. Mr. Justice Patteson [page 750] said:—"Taking the rule of construction in the strongest and most favourable way for the defendant, it cannot be pressed beyond this—that where the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words."

The case of *The Mayor of Cambridge v. Dennis* (e) is a remarkable illustration of the application of the principles of construction to a contract of the class to which that now before us belongs. Lord Campbell commenced his judgment by saying:—"I am of opinion that the parties did in fact look beyond the current year. But judicially and technically I am not at liberty to come to that conclusion; for, according to the authorities, when the office in respect of which the security is given is for a year only, express words are required to make the security extend to more than a year. It seems to me that the words here are not so strong as those in *Oswald v. The Mayor and Burgesses of Berwick*—

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(a) Carth. 118.

(b) 8 Ves. 416.

(c) 4 M. & S. 423.

(d) 15 Q. B. 733.

(e) El., B. & El. 660.

H. T. 1865. *Exch. Cham.* *upon-Tweed* (a), or as those in *The Mayor of Dartmouth v. Silly* (b), nor stronger than those in *Peppin v. Cooper* (c). I THOMPSON v. ROBERTS. "should have thought that the words in the last-mentioned case, " 'at all times hereafter,' meant that the security should be in force "as long as the officer held the office; but the Court held that this "was not so, and that the security continued only during the year of "office." In the case of *The Mayor of Cambridge v. Dennis*, the restricted recital referred to the tenure and term of the office. In the present it refers to the nature of the office; but the principle of construction must be the same.

I now proceed to consider how the language used in the condition of this bond is affected by the recital; and the first observation that must occur to any one who has heard the argument is that, upon the construction for which the plaintiff contends, several portions of the instrument are absolutely useless; they constitute so much waste of words. Upon that construction the true meaning of the condition is the same as if the recital were altogether expunged, together with all that relates to the service or employment mentioned in it, and all such terms as describe "other services." It would have been sufficient to have at once declared that the obligors would be answerable for all defaults (merely describing those defaults) of which the servant should be guilty in any service in which he then was, or thereafter should be employed by the Company. Such a general engagement requires no recital, and would have been sensible and consistent. And if any recital at all were inserted, it should have been a recital that Alexander Roberts was then employed by the Company. For such general engagement, it was wholly useless, and was only calculated to incumber the instrument with needless and perplexing surplusage, to state that he was employed "as a writing clerk." And I can conceive no reasonable purpose for introducing that statement at all, save that of explaining and governing, by that recital, the subsequent obligatory words.

Let me now consider the form of the recital, and the words which follow it. The recital is, that "Alexander Roberts hath been taken

(a) 5 H. of L. Cas. 856.

(b) 7 E. & B. 97.

(c) 2 B. & Ald. 431.

"and admitted into the *service and employment* of the above-named *H. T. 1865.*
Belfast Banking Company, for the time being, *as a writing clerk.*" *Exch. Cham.*
 Then follows the condition, beginning with these words:—"Now,
 "the condition of this obligation is such that, if the said Alexander *THOMPSON*
 "Roberts do and shall, from time to time, and at all times hereafter, *v.*
 "*during his continuance in the service or employment of the said*
 "*Company*, faithfully, diligently, and carefully execute, perform, *ROBERTS.*
 "and discharge the *said service.*" It is conceded, and it cannot,
 consistently with the authorities, or with any reasonable construc-
 tion of the words, be denied that, if the terms descriptive of the
 employment stopped there, they must refer to the service or em-
 ployment "as writing clerk," and to no other. Then come these
 "words:—"And every *other* services of the said Company wherein
 "he *is*, shall, or may be employed." We here find an ambiguous
 word; "other services," in the context, may mean other services
 than those of a writing clerk, rendered *during his continuance in*
the service or employment of a writing clerk; or may mean "other
 services" during any service or employment to which he may at
 any time be appointed. Upon the first construction, the words
 would provide that if, while the writing clerk should be acting
 in that capacity, he should be resorted to by his employers to do
 occasional duties not properly or ordinarily belonging to the func-
 tions of a writing clerk, he and his sureties should become an-
 swerable, under the condition of the bond, for any default committed
 by him while so employed, whether acting within or without the
 range of those ordinary duties. Instances of such services were
 mentioned by Mr. *Battersby* in the course of the argument; some
 of the other servants acting in a superior capacity, and at a larger
 salary, might be ill or absent: a sudden exigency, or pressure of
 business, might occur in the Bank. For such purpose (not at all
 unlikely to occur in such an establishment) it might become abso-
 lutely necessary to resort to the services of some of the writing
 clerks; it might be necessary to place him where he would have to
 receive and pay checks during a day, or a part of a day, or a week;
 acting with duties and responsibilities, temporary and limited, but
 still far exceeding those of a mere writing clerk. He might be sent

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out to collect the amount of bills of exchange falling due, and to execute other duties requiring that entries should be carefully made in books, and that those books should be preserved, and restored to his employers. He might have to receive, and to account for large sums of money, during such casual and temporary employment; and such services would be properly described as "other services" than those of a "writing clerk;" while they would be services rendered during the continuance of his service and employment "as writing clerk" under the Company. For this construction of those words, the recital, as it stands, would be pertinent and proper as an index to the meaning which they who prepared, and they who executed the bond, intended to attach to the contract contained in it.

By the second construction of these words for which the plaintiff contends, "other services" must include all the services of every new employment to which the servant might be appointed, however onerous the duties,—however large the responsibilities,—and however numerous the successive employments might be.

Upon the pleadings in this action, it appears that Alexander Roberts ceased to be writing clerk, and was appointed cashier; and that in that capacity he became a defaulter for large sums of money, withdrawn or embezzled by him, to an amount far beyond the penalty of the bond. The office of cashier was one of a wholly different class, as its name imports, from that of a writing clerk, with far larger temptations, and far greater power of involving in risk and liability the sureties in the bond. All the reasons which have influenced the Courts, for nearly two centuries, to give a construction to such instruments, limited and restricted by reference to the recitals, apply most powerfully to the present case; and, when I find words capable of one meaning which gives force and purpose to the recital of the special employment of the servant, and of another meaning which would render such a recital useless and nugatory, I am, by the ordinary rule of construction, namely, that effect ought, if possible, to be given to every word of the instrument, constrained to adopt the former meaning, and reject the latter. I therefore think that the terms "during his continuance in the service or employment" mean, during his continuance in that service or

employment which was just before described—namely, that of a writing clerk; and that “other services” mean other services than those of a writing clerk, rendered “during the continuance of his employment” as such writing clerk under the Company.

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This construction is materially aided by the other terms of the condition. The words “and all and every *other* services of the said Company, wherein he *is*, shall, or may be employed.” What is the meaning of the expression, “and all and every *other* services of the said Company wherein he *is* employed”? It means the “other services” than those of a writing clerk, “wherein he is employed” at the time of the execution of the bond. He was *then* in the employment of the Company as “writing clerk,” and as a writing clerk only. Plainly, therefore, “other services,” applied to the then present time of entering into this contract of indemnity, meant, not services rendered in a new employment, but services rendered during his existing employment as writing clerk, though without the range of the ordinary duties of that employment. If such be the necessary meaning of the terms “other services,” applied to the then present time, it is a reasonable construction to give to the same words the same meaning in reference to the future, and to construe them as applying, both for the present and for the future, to services rendered during the continuance of Alexander Roberts’ employment as writing clerk, beyond the ordinary duties of that employment.

I may further observe that, in all the subsequent passages of the condition in which reference is made to the performance of the servant’s duties or defaults in his employment, the words “his *said* service or employment” are used in the singular number. A person not versed in legal criticism, but signing this bond, with the recital placed in the front of his contract, would, I think, fairly consider that the “*said* service and employment,” referred to throughout the condition, was that service and employment which the clerk then held, and which was described in the sentence by which the condition was prefaced. That sentence might fairly be treated as the index to the true meaning of the bond.

I own I am disposed to look with great jealousy on the introduction of general words into instruments of this description, in

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which the first thing the surety who is called upon to execute it looks to is the description of the employment of the principal, for whose acts he is about to make himself answerable. If the employment be that of a writing clerk, and if it be agreed to extend responsibility for acts done in a different capacity, it is easy to use words strong enough and clear enough to show to the party executing the bond that he is undertaking the extended, and not the limited responsibility.

On the whole, I entertain the opinion that the judgment of the Court below ought to be affirmed.

MONAHAN, C. J.

I cannot pretend to say that this case is free from difficulty. The difference of opinion which exists among the Members of the Court is quite sufficient to make me doubt the propriety of the view I have taken of it. But, having given the case the best consideration in my power, I concur in the judgments of my LORD CHIEF BARON and the Court of Queen's Bench.

The general principles of law applicable to cases of this description have been so accurately laid down by the Members of the Court who have preceded me, that it is unnecessary for me to repeat them; and the only question is, the proper application of them to the facts of the present case. Without doubt, there is a general rule of law to this effect, that, if there be a recital in a bond of this kind, showing the nature of the office to which the party has been appointed, and as a security for whose fidelity the bond has been executed, the recital, special in its terms, will control the general words of the condition; and it occurs to me to be equally certain that, in order to get rid of a recital of this kind, the obligor must show clearly and unequivocally that the intention of the parties was to go beyond the recital contained in the early part of the bond.

I shall refer to only one passage in the judgment of Mr. Justice Coleridge, in the case of *The Mayor of Cambridge v. Dennis* (a). The passage to which I refer shows so clearly how the general

(a) El., B. & El. 660.

principles of law are to be applied to a case like the present, that I cannot forbear reading it. At page 668, Coleridge, J., says:—"No doubt these words—that is, the words in the obligatory part of the bond, and which it was contended enlarged the recital—may mean such statutes as may be passed during any time for which the officer shall hereafter be appointed; but they may mean also such statutes as may be passed while he holds under the present appointment,—that is, the current year of office. The meaning may be, that the surety is willing to take his chance of any change that may occur during the year, and to undertake such contingent liability for that time. Now, if the latter may be the meaning, then I crave in aid the presumption of the greater probability, which I think overpowering. "I think therefore judgment should be given for the defendant."—That I consider to be a true exposition of the law; and I think the difficulty in the present case is, to know how to apply that exposition to the facts before us. Now what are the facts that appear upon the pleadings? It appears that, sometime previously to the month of February 1854, this person, Alexander Roberts, was in the employment of the Belfast Banking Company, as a writing clerk. It appears that he continued for some years to fulfil the duties of that office; and that four or five years after his appointment he ceased altogether to discharge the duties of writing clerk, or to be employed in that capacity, and was appointed to an office altogether different in its nature, and with different duties and much greater responsibilities. Now, in order to ascertain the intention of the parties in executing this bond, I admit that we must confine ourselves to the instrument itself, and that we are not at liberty to speculate upon what may have passed in the minds of the obligor or obligees at the time of its execution. For if we were to speculate on what may have passed in the minds of the parties, I have little doubt that when this defendant was told that the party for whom he was to become surety was in the employment of the Bank in the humble capacity of a writing clerk, his intention was to become surety for him only while he was in that capacity; and that he never imagined, when he executed the

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H. T. 1865. bond, that he was to become surety for him in the much more
Exch. Cham. responsible office of cashier; and it is to be observed that the
 THOMPSON penalty of the bond bears no proportion to the amount of the
v. responsibility of the situation in which this person was subsequently
 ROBERTS. employed. For the amount of the bond is only £1000, and that is
 the security for the fidelity of a person whose position enabled him
 to embezzle the money of the Bank to the amount of £5000. In my
 opinion there is something so monstrous in the construction the
 Counsel for the Bank puts upon this document, that I approach
 the reading of it with every inclination to find upon it something
 which will enable me to exclude from it the interpretation con-
 tended for.

The recital of the condition of this bond is as follows.—[See
 recital in statement, p. 490.]—Now what is this instrument? It is a
 bond of indemnity. And what is the object of the recital, unless
 it is for the purpose of showing the duties for the due performance of
 which the bond was to be executed? I do not see how it is possible
 to suggest any other. That being the recital, the condition is, that
 “if this person shall, from time to time hereafter during his con-
 tinuance in the service or employment of the said Company,
 “faithfully, honestly, diligently and carefully execute, perform and
 “discharge the said service.” Now what is the meaning of the
 words “the said service”? As I understand them, and as it
 appears to me to be the opinion of the Members of the Court who
 are in favour of the plaintiffs, those words, though general in their
 terms, and though capable of the meaning “the service in the Bank
 generally,” must be cut down to mean the service of this person as
 a writing clerk. If that be so, what is the meaning of the words
 which follow, “and all and every other services of the said Company
 wherein he is, shall or may be employed”? I think it is plain that
 these words, “other services,” &c., are not to receive one meaning
 applicable to the word “is,” and another meaning applicable to the
 word “may.” As I read those words, they are applicable in the
 first place to the service in which the party was employed at the
 time of the execution of the bond. And I conceive the legal
 meaning to be, that the defendant was to be surety for this man

while in the capacity of a writing clerk, but that the security was not to be confined to his strict duties as a writing clerk, but was to extend to all the duties which might be imposed on him by the Bank while he continued in their service as a writing clerk. It is not contended that there is a syllable in the whole of this bond—providing as it appears to do for every possible object, and prepared as it has been by this Banking Company so as to be applicable to every one in their employment,—there is not, as I have said, a syllable that would have the effect of altering the construction I have put upon it, except the words “and all and every other services,” &c. If those words may receive a meaning consistent with the limited construction I have suggested, it appears to me that, according to the principle of the cases I have referred to, the Court is bound to give them that limited construction.

The only other observation I shall make is upon the clause at the end of the bond—viz., “that the said Alexander Roberts shall remain in the employment of the said Belfast Banking Company for three years certain, subject to right of discharge for misconduct; and that the said sureties may, after said three years, withdraw their liability by giving to the directors three months’ previous notice in writing.” I can quite understand that, if they entered into a liability to be sureties for this person while a writing clerk, that was a fair and reasonable condition; but if they intended to become surety for him in the office of cashier, which is an office with totally different duties, one would expect to find something in that clause referring to a change of office.

On the whole case, therefore, as I have said, the sole question is, the application of the law to the terms of this written instrument. In my humble judgment the correct construction was that put upon it by the Court below; but, of course, the judgment of this Court is, that the judgment of the Court of Queen’s Bench be reversed.

Judgment of the Queen’s Bench reversed.

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COURT OF CRIMINAL APPEAL.

THE QUEEN v. GEORGE GILLIS.*

May 29.
 June 7.

A constable went to the house of A, to obtain information about B, and was then told by A certain facts implicating A in a treasonable conspiracy. The constable left, and returned next morning and asked A if he was willing to come down and repeat his statement to the superintendent of police. The superintendent asked A to go before a Magistrate and make an information "as a witness." A consented, made an information, and afterwards re-swore it; and made a further information in the presence of B, and others. He was examined by the Magistrate and by Counsel, and received no caution against criminating himself. Subsequently he refused to give evidence on the trial of B, and the other prisoners, he was arrested and tried for treason-felony. His own informations were put in evidence against him, and he was convicted.

THIS was a case reserved from the recent city of Dublin Special Commission. The following were the facts stated by the learned Judges:—

The prisoner was tried, at the Special Commission, for treason-felony, and found guilty. He was sentenced to five years' penal servitude.

Upon the trial, Mr. John Calvert Stronge was called as a witness. He is one of the Divisional Magistrates for the city of Dublin. Proved his name and handwriting to the depositions of the prisoner, first taken on the 27th of September, and re-sworn on the 2nd of October 1865. Prisoner made the information on oath, and signed it in witness's presence. He was sworn, and must have been asked if the contents were true.

On cross-examination—The information was taken from prisoner in reply to questions from witness, and in some instances he followed up the answers with statements of his own. He was first sworn. He was produced as a witness for the Crown, ready and willing to give his evidence for the Fenian prosecutions. There were about forty prisoners then in custody. No one present before witness when he made his first information on the 27th of September,—no one present but the clerk who took down the evidence,

He was examined by the Magistrate and by Counsel, and received no caution against criminating himself. Subsequently he refused to give evidence on the trial of B, and the other prisoners, he was arrested and tried for treason-felony. His own informations were put in evidence against him, and he was convicted.

Held (dissentientibus MONAHAN, C. J., and KEOGH, J., dubitante FITZGERALD, B., as to the first information), that both informations were inadmissible, and that accordingly the conviction was erroneous.

* *Coram* LEFROY, C. J., MONAHAN, C. J., KEOGH and O'BRIEN, JJ., FITZGERALD and HUGHES, BB., FITZGERALD, J., DEASY, B., and O'HAGAN, J.

himself, and witness. The information was read over in the presence of the prisoners in charge, and the prisoner was then re-sworn. The prisoner was produced by some member of the police force. He was not in custody; but a statement was made to me that he could give evidence about the pike-making. The statement made in his presence was, "Here is the witness." He was then examined by witness, believing that he could give evidence as to pike-making. Witness did not know that he knew anything of the conspiracy. His statements came out one after another as witness pursued the subject, finding that he knew much more than witness thought. Witness did not look on him as an informer, but treated him as a Crown witness in the ordinary sense. No one had charge of him. He was not in custody. Beyond all question he was not. The first step witness took was to swear him. Administered the oath as a Magistrate. His evidence affected all the prisoners, and more particularly Michael Moore. Witness gave him no caution whatsoever. Did not consider he would implicate himself. Did not caution him on the second occasion. Witness did consider him on the second occasion in the nature of an approver. Not the slightest inducement was held out to him on the first or second occasion by witness or by any one to his knowledge.

Charles Smith, one of the G division of police, examined.—Went to look for Moore at Francis-street on the 26th of September, and saw the prisoner. Told him I came to make a search. I said, "I understand you have a forge." He at once went to a door and opened it, and admitted us to the forge. He said he had let the forge to Michael Moore, who he knew was a blacksmith, and that on the following Monday he brought in three other men, whom he named. He told me the way they were making pikes, and how they were sent out. I left, and returned again on the morning of the 27th. I asked him, "Are you willing to come down and state what you stated to me to my superintendent?" He said "I am." He thereupon put on his coat and came along with me. He did that perfectly voluntarily. I did not hold out the slightest inducement or threat to make him give evidence. He told me that on one occasion he carried fifty pikes to a man at the corner of Mark's-

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alley. He told me he attended a Fenian meeting at a house kept by a man named Phibbs, at the corner of Patrick-street. It was attended by seventy-five officers, amongst others Moore. He also said he was a serjeant in the society. The next day, went back and asked him would he make the statement to my superintendent? and he said he would; and all that was voluntary and without any inducement or threat whatsoever. Went on the 5th of October to him, and told him I came for him to come and hear his informations read over in the presence of the prisoners. He at once put on his coat and came along with me, and he then said, "If I had to do this again I would rather take ten years than do it, for my family will be ruined by it." I brought him down to the Lower Castle-yard, and he then said he would take five years now to get out of it.

Cross-examined.—I was in plain clothes, and so was Serjeant Clarke. He knew me perfectly well, and bid me good morning. The conversation was going on whilst we were searching. I asked him some questions about Michael Moore, how he made the pikes. Moore was in custody at the time. To the best of my belief, I told him Moore was in custody. Said it was unpleasant to search his place, but that I must do my duty. I did not go to make an arrest. Prisoner was not in our custody. On the 27th, Clarke and I accompanied prisoner to Superintendent Ryan, Lower Castle-yard.

Mr. Superintendent Ryan examined.—I brought Gillis down to the Magistrate. He came voluntarily. I introduced him. I never held out any inducement or threat whatsoever. I asked him had he any objection to give information, and he said not. I saw him after in prison, and said if he would adhere to his first information I could serve him. I did not tell him that he ought not to criminate himself, or that what he would say would be used against him. I knew from his own statement that he had been implicated in the conspiracy, from his own voluntary statement. I then asked him was he willing to make that statement before the Magistrate, and it was to be as a witness. He said "yes." I then, in the prisoner's presence, said, "Here is a man named Gillis, and would your Worship hear what he has to say, and take his information?"

I understood him to go before the Magistrate as a witness, and I have no doubt he understood the same.

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At the close of this evidence the Crown tendered in evidence the prisoner's information. Mr. *Butt* objected to its reception, and we allowed the information to be read, reserving the propriety of our doing so for the consideration of the Court of Criminal Appeal.

If the information was improperly received, the conviction cannot be sustained. The objection taken to the information was, as being made under an expectation that prisoner would be taken as an approver or witness; and, secondly, that, being on oath, he was bound to answer all questions put to him, unless he said it would criminate himself to do so.

We refer to the information.

May 1866.

WILLIAM KEOGH.

Copy of Informations.

Police Division of Dublin Metropolis,
to wit.

} The information of George
} Augustine Frederick Gillis,

of No. 83 Francis-street, cart and dray maker, in said district, taken before me, one of the Magistrates of the Dublin Police in said district.

I, informant, being duly sworn upon oath, depose and say that:—About four months ago the man now in custody, called Michael Moore, came to me at the place above mentioned, and took from me the stable at the rere of my house, at the place aforesaid, at one shilling and sixpence a-week. I knew he was a blacksmith; and he told me he wanted the stable for a forge. I gave him the key, and he took possession at once, and brought there two vices, one bellows, one anvil, sledge-hammer, and smith's tools. It was some time in the middle of the week he took the stable; and on the following Monday he began to work. On that morning he brought four assistants, named Peter O'Brien, John Moore (brother to Michael Moore), Peter Kearney, and Michael Cody. They commenced at once making pike-heads, and never ceased until the Friday before the *Irish People* newspaper was seized. They made from one hundred to one hundred and twenty pike-heads a-week. We all knew perfectly well that the pike-heads were for the use of the Fenians in

T. T. 1866. Ireland. The price of each pike-head was two shillings and six-pence. The pike-heads were removed in boxes of fifty; and when only two dozen were wanting, they would be carried away under the arm of one of us. On one occasion I brought fifty pike-heads, tied up in a cloth, to the public-house of a man named Hendrick, at the corner of Mark's-alley and Francis-street; and I then delivered them, by the directions of Michael Moore, to a man whom I did not then know, but whom I could recognise again. I sat a full hour with this man. We had some drink together.

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We had the place so contrived that no person could be admitted without my consent. If I did not know the person demanding admittance, I applied to Michael Moore, or, in his absence, to any of the other workmen.

I know a man called Captain Michael O'Boyle. On two occasions he came into the stable while the pikes were making. The last occasion was about three weeks ago, when I heard he went to the country. He came there to see Moore, with whom he was intimate; and he knew very well that the pikes were making for the Fenian movement.

I am acquainted with the Fenian oath. It is as follows:—"In the presence of Almighty God, I do solemnly swear allegiance to an Irish Republic, now virtually established, and to take up arms, when called upon, for its defence and integrity. I also swear implicit obedience to my superior officers. I take this oath in the spirit of a soldier of liberty.—So help me God."

Several persons connected with the Fenian Society, whose names I don't know, but whom I could recognise again, visited the stable where the pikes were made. I could also identify several of the Brotherhood who attended drill in the drawing-room of my house. On one occasion I was drilled myself. Michael Murphy is the name of the man who drilled me. About thirty men used to meet in my drawing-room, drilling. A man named Michael Carolan, a shoemaker, took the drawing-room from me for the drilling purposes. The rent was raised by subscription from the persons drilled. I subscribed among the rest. I was a "C" in the Fenian Brotherhood. It signifies Serjeant. "A" signifies Colonel; "B" signifies

First Lieutenant. I don't know what stands for Captain. I know nothing of the officers, except the man who is immediately over me.

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I remember yesterday (Tuesday) three weeks, 5th of September 1865, I attended a Fenian meeting of Fenian officers only, held in a public-house at the corner of Patrick-street and Kevin-street, kept by a person named Phibbs. The meeting took place at half-past eight o'clock in the evening. There were present seventy-five officers of the Brotherhood, amongst whom I saw said Michael Moore, John Moore his brother, Captain O'Boyle, a man named Clobissy, said Michael Carolan, and several other persons whom I could identify. There was a man placed at the door to prevent any one but Fenians going in; any person unknown to the doorkeeper was asked who he knew at the meeting; and when that was ascertained to be correct, he was admitted. There were speeches made, the drift of which was, to stick together and stay united, and not to flinch man to man.

The object of the Fenian Society was, and is, to unite; and, if a rebellion took place, to assist in it, and establish a Republic.

On Friday, before the arrests were made, and the day previous, about three hundred and seventy pike-heads were removed from the forge. The pike was similar to the heads of the lances used in her Majesty's army by the Lancer regiments. The spear was seven inches, and the straps eighteen inches: two feet one inch altogether.

I have looked at the painted flag now produced. The stripes represent the four provinces, and the stars represent the thirty-two counties in Ireland.

I saw with Michael Cody, in the forge, two six-barrelled revolver pistols.

On this morning said John Moore came to my workshop, at the place first named, and said to me, "You had a visit from the gentleman of the G," meaning the detective officer; and he asked me what transpired between us. I told him. He replied, "You had no right to tell them anything; they are only sifting." I told him they knew as much as myself. He remarked to me that his brother Mike would be in a great hobble from my information.

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No one got pikes except persons who represented themselves to, and were known by Michael Moore as Fenian Centres.

Sworn before me, 27th September 1865—J. C. STRONGE.

Informant bound in £100 to prosecute at City
Dublin Commission Oyer and Terminer.

Re-sworn before me, 2nd October 1865—J. C. STRONGE.

GEORGE GILLIS.

Police District of Dublin Metropolis,
to wit.

} The further information of
George A. F. Gillis, in said

district, taken before me, one of the Magistrates of the Dublin Police in said district.

I, informant, being duly sworn upon oath, depose and say that—
I wish to make two corrections in my information of 27th of September last, which are, first, that the Friday before they (Moore and his companions) left, before the arrests were made, the same number of pike-heads, about one hundred and twenty, instead of three hundred and seventy, were sent out. I only saw one revolver, instead of two, with Cody, as therein mentioned.—GEORGE GILLIS.

Sworn 2nd of October 1865—J. C. STRONGE.

Cross-examined by Mr. *Sidney*.—Are you a Fenian? Yes, sir.
—Do you think you ought to be in the dock? I don't know.—How long are you a Fenian? About five months.—You were dragged here? I was brought here by the police for having my place set.
—Are you still a Fenian? I always supported the cause.—What brought you here? Two of the detectives dragged me here.—When were you arrested? I don't know; the gentlemen here can tell.—What's a Republic? Independence of the country against Crown and Constitution.—That flag represents the provinces and thirty-two counties? Yes.—Are you in custody? No.—Where have you been since Thursday last? I have been working at my own place.
—How much do you expect for this job? I swear I expect nothing; I came to save myself.

Sworn 2nd of October 1865—J. C. STRONGE.

Information of Nagle, Larkin, the Misses Mitchell, Smollen,

Dawson and Hughes, police officers, read in the presence and hearing of the prisoners, O'Leary, Luby, O'Donovan, ~~Rossa~~, O'Connor, and O'Keeffe; all of whom were committed for trial, 2nd October 1865.—(Signed) GEORGE GILLIS.

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J. C. STRONGE.

Police District of Dublin Metropolis,
to wit. } The further information of
George Augustine Frederick Gillis, in said district, taken before me, one of the Magistrates of the Dublin police in said district.

I, informant, being duly sworn upon oath, depose and say that:—

I now see and identify young Heyburne. I do not recognise that man (Michael Moore). I know the detective man sitting in the corner. I don't know the names of the men sitting either on his right or left. I see the second man from Doyle (Michael O'Boyle). I don't know him; to my knowledge, I never saw him before. I know the next man, Pat Heyburne; but I never gave any information against him, or knew that he was a Fenian at all. I don't know any of the other prisoners now present here—Carey, Archdeacon, Patrick Scally, James Quigley, and John Fottrell.

Cross-examined by Mr. Barry.—To Mr. Barry.—Did you know Michael Moore, the blacksmith? He was introduced to me.—I don't know who introduced him. I knew a man represented as his brother John. I knew Captain O'Boyle: he was introduced to me by the party represented as Moore. O'Boyle was a thick, stout, gentlemanly-looking man; carried a watch. I never visited Moore at his residence; I think I never told anybody that I did. I was frequently in the stable with Moore after they were making the pikes; O'Boyle was there twice. I don't recollect the name of the person who introduced Moore to me, I got into company with so many Fenians. Moore did not tell me what he wanted the place for. I saw that flag here. I painted one for myself. I saw it in picture shops. I did not see one exactly like it. Mine was painted more of the red or pink than the yellow. I put four stripes for the four provinces, and thirty-two stars. John Moore did not tell me his brother was taken. I heard that Moore was taken. A man I always took to be John Moore did not come to me until after I was

T. T. 1866. arrested. He said my information had got his brother into trouble.
Crim. Appeal. I don't know where this John Moore is now; I never saw him
 THE QUEEN since. He did not say what gaol his brother was in.
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To the Magistrate.—I went to Erne-street three or four weeks ago. I heard that a man named Byrne lived there. I went there for the purpose of seeing Michael Moore. I went to a cottage in Erne-street; I think it was No. 19. The John Moore who spoke to me I heard lived in New-row. I never said he lived on the Coombe. The young man called John Moore lives, I believe, at Warrenmount, at the top of New-row, off the Poddle. I never was in his house.—(Signed) GEORGE GILLIS.

Sworn before me, 5th of October 1865—J. C. STRONGE.

Waters (with him Butt).

This case is not identical with *The Queen v. Johnston (a)*. That case decided that certain answers given by a prisoner in custody, to a policeman, in answer to questions put by the policeman, without any previous warning or caution, were receivable in evidence against the prisoner on the trial afterwards. It amounts to this only, that the mere fact of a policeman putting questions to a prisoner, without any previous warning, does not constitute an inducement. But here the facts do constitute such an inducement. Take three answers of the prisoner in the cross-examination by Mr. Sidney :—"I was brought here by the police." "Two of the detectives dragged me here." "I expect nothing; I came to save myself." These show the prisoner knew he had something to fear when the policeman came to him. These answers prove this much, that the information was made under the influence of hope. That is the first point. How the hope was produced is another question. What the policeman said to the prisoner amounted, under the circumstances, to a promise not to prosecute if he gave his evidence: the mere asking him to come by the detectives amounted to this. "The admission of a party as a witness amounts to a promise of a recommendation to mercy:" 2 *Stark. Evid.*, p. 12. But *The Queen v. M'Hugh (b)* goes much farther, and is an express authority for

(a) 15 Ir. Com. Law Rep. 60.

(b) 7 Cox Cr. C. 483.

me. There are only two points in which it differs at all from the present case. The first is, that there the prisoner was in custody and charged with an offence: here he was not. Secondly, there the information was given unsolicited: whereas here it was given in answer to a request by a person who, I maintain, was one in authority. Both are identical as to the prisoner being taken as an approver, for Mr. Stronge swears here that on the second occasion he regarded Gillis as an approver. As to the first difference, Gillis was not in custody only because he expressed to the constable his willingness to become an approver. The police abstaining from arresting him, and knowing his promise to give information, was a sufficient holding out of inducement.—[MONAHAN, C. J. Does your argument come to this:—Suppose a man knows that he is a guilty accomplice in an offence, and comes to a Justice and says, "I am willing to give information." It is quite certain that he would think that by so doing he would escape prosecution. But the question remains whether that, being a hope inspired by himself, would exclude his testimony?—That is *Rex v. Berrigan* (a), and the evidence was held admissible. But the facts are different here, and I do not controvert *Berrigan's case*. Here Ryan was previously aware of what the man could state; and then he comes and asks him to give evidence. In *The Queen v. Lewis* (b) an examination of the prisoner was rejected in evidence, although the prisoner had not been charged with any offence at the time she signed the examination. So, in *Rex v. Davis* (c), *Rex v. Wheely* (d), *Rex v. Owen* (e), *Rex v. Bentley* (f). In the note to *Rex v. Lamb* (g) two classes of informations are distinguished: first, the one made voluntarily; and, secondly, that made with a request to be taken as King's evidence. The notice of this question in *Taylor* is very brief (see section 20, p. 779); he refers to the cases I have cited, and says they cannot safely be relied on. That passage, however, was considered in *The Queen v. M'Hugh*, which followed these

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(a) Ir. Cir. R. 177.

(b) 6 Car. & P. 161.

(c) 6 Car. & P. 177.

(d) 8 Car. & P. 250.

(e) 9 Car. & P. 238.

(f) 6 Car. & P. 148.

(g) 2 Leach Cr. L. 559.

T. T. 1866. *Crim. Appeal.* cases. But in the case on the other side, *The Queen v. Tubby* (a), there does not seem to have been any real question: the Judge says:—"No suspicion attached to the party at the time." In *The QUEEN v. King v. Boswell* (b) a portion of the evidence was rejected on the grounds I urge here. In *Rex v. Dingley* (c) the man was cautioned first, and the examination was clearly his own voluntary act. The reason for the admissibility of evidence of this kind given in *Taylor* is, that a man on examination is not bound to criminate himself; he must be supposed to know the law, according to the general legal principle; and so, answering questions that criminate him, must be taken to be his own voluntary act. That reasoning does not apply here; for Gillis was not brought here to give evidence generally, and then asked, amongst others, questions that criminated himself. He was brought here to criminate himself. If he did not criminate himself his evidence would have been perfectly worthless to Ryan.—[FITZGERALD, B. Is it settled whether the Judge is bound to tell the witness he need not answer where questions are put likely to criminate him?]
—There is no manner of doubt that if the Judge misdirects the witness, then his answers cannot be given in evidence against him. Then, as to Ryan being a person in authority; he acts as such; he asks the man will you give information. And that is a very different thing from asking him to become a witness. He does not summon him as a witness; but he comes and asks him to give information, and then takes him off to a Magistrate. All the facts show that he acted as if he had authority to make terms with Gillis, and that he gave Gillis the idea that he was making terms with him. The question whether inducement was held out or not must be determined by the Court or by a Jury on all the facts of the case.

Heron (with him *Walsh*), for the Crown.

In all the cases where the Judges have expressed themselves against receiving evidence of this kind, the prisoner was in actual custody. Three of the cases cited on the other side are all decided

(a) 5 Car. & P. 530.

(b) Car. & Marsh. 564.

(c) 1 C. & K. 637.

by Baron Gurney—*Rex v. Lewis* (a), *Rex v. Davis* (b), and *Rex v. Owen* (c). In *Rex v. Hamworth* (d) we have a decision by Mr. Justice Parke exactly the other way. *Rex v. Tubby* (e); *Rex v. Brinnell* (f); *Rex v. Chidley* (g).—[LEFROY, C. J. In that case the witness came forward voluntarily to exculpate Chidley; that makes all the difference.]—*Anonymous case* (h). All these show that Baron Gurney's opinion was not shared by the other Judges. Now as to depositions before a Coroner:—In 3 *Russ. Cr.*, p. 416, Mr. *Greaves* states—"A difference of opinion exists as to whether the examinations of a person on oath as a witness before the Coroner can be admissible in evidence against such a person on his trial afterwards." In *Rex v. Owen* there are two conflicting decisions—one by Baron Gurney and one by Mr. Justice Williams (i). In *Rex v. Chesham* (k) such evidence was admitted, and the prisoner was convicted and executed. Mr. *Greaves*, in *Russ.*, pp. 411 and 418, sums up the results of these cases.—[FITZGERALD, J. Is there any case where the party has been solicited to become a Crown witness, and made the statement under the influence of that solicitation?—The nearest to that is *Rex v. Burley* (l). There it is said, by breach of the condition the accomplice forfeits his claim to favour, and is liable to be tried and convicted on his confession.—[FITZGERALD, J. That is a confession made previous to the party becoming a witness. That does not touch this case. There is no question here but that what he said to the policeman might be given in evidence.—O'HAGAN, J. You cannot rely upon the breach of contract, to get this in evidence. If the party violates his contract, of course the Crown may prosecute him, but they must prosecute him according to the ordinary principles of law, and rely upon legal evidence for his conviction. The case of *Rex v. Gabbett* (m) is one of importance as to a

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(a) 6 Car. & P. 161.

(c) 9 Car. & P. 83.

(e) 5 Car. & P. 530.

(g) 8 C. Cr. C. 365.

(i) 9 Car. & P. 83.

(l) 2 Stark. 13.

(b) 6 Car. & P. 177.

(d) 4 Car. & P. 254.

(f) 4 C. Cr. C. 402.

(h) 4 Car. & P. 255.

(k) 1 Russ. 418.

(m) 1 Den. Cr. C. 236.

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witness being compelled to criminate himself.]—The foundation of the rule for excluding evidence in these cases is, that the party might be tempted from hope or fear to state what was not true. Now that does not apply to this confession, for Gillis had already made the statement to the policeman: *Rex v. Court (a)*. Then I come again to the case in *Starkie*, and demand why the Crown should not have the benefit of the breach of the condition.—[FITZGERALD, B. There is nothing here to show that he broke the condition.]—Nor to show that the Crown promised not to prosecute.—[FITZGERALD, B. Suppose we do not go the length of saying there was any promise held out?—But was the man to be in any way the better for doing it? Was he under the influence of hope?—[O'HAGAN, J. Mr. Stronge states that, on the second occasion, he regarded this man as an approver.]—His regarding him as an approver, and his not giving him any caution, conveys to an ordinary understanding that whatever the man said could not injure him.—[Reads Mr. Stronge's evidence from the case.]—Here there is no objection taken by the witness; he must be supposed to answer voluntarily.—[FITZGERALD, B. No doubt that is the technical answer in *Rex v. Gabbett*. But is it not pressing it to an enormous length to say that a Magistrate may go on asking a witness questions which may criminate himself, and never giving him a caution? If the man was in custody, he ought clearly to have received a caution. Why should he not as the case stands?—LEFROY, C. J. Mr. Stronge believed nothing he said could injure him, as he was really a Crown witness. He dealt with him as an informer.—HUGHES, B. Is it not a fair test of the influence under which the prisoner gave his evidence, to inquire what became of him afterwards, when he refused to support it?].

Walsh.

The inducement to exclude the confession must be held out by some person in authority. That is, there must be some charge against the person. There must be some prosecution either threatened, or expected, or pending. The meaning of a person in

(a) 7 Cr. & P. 486.

authority is this—a person who may have some influence over an anticipated or pending prosecution. That is settled in a case referred to in 3 *Russ.*, p. 394, where a woman charged with child-murder confessed to her mistress, and it was ruled that the mistress was not a person in authority within the meaning of the rule. We must recollect this information is not the entire case against the prisoner. It is his own admissions that make a complete case against him. Except for some isolated fact the statement did not necessarily implicate the prisoner at all before Mr. Stronge questioned him. If it was described, for instance, as a simple statement of his own, made at a particular time and place, just as consistent with his innocence as his guilt, could it afterwards be used against him, with other matters, to procure conviction? If it could, the extent to which the statement goes cannot be legitimately used to prevent its reception. He cannot, by his own statement, render his information inadmissible. The mere expectation of being taken as Queen's evidence will not render the information inadmissible. There was nothing to show the Magistrate that this man was a Fenian until his own statement was made. I cannot find any definite decision as to the duty of the Judge to give a caution. It was done in Lord Cardigan's trial, and it is discussed in *Rex v. Rednaugh* (a). In Mr. Baron Gurney's decisions the prisoners were committed on the spot, immediately after giving their evidence; and in one of those cases, *Rex v. Owen* (b), his decision is expressly over-ruled.

Another matter urged on the other side is, that the prisoner is to be looked upon as an accomplice—that this is the case of a person to be taken as an accomplice. It is settled law that, once the officers of the Crown take a particular course in administering justice, that course cannot be sifted, criticised, or inquired into in a public Court of Justice. You cannot ask an informer how he got particular knowledge; you cannot ask a policeman how he made his inquiries. The administration of justice would be perfectly impossible if such inquiries were permitted. The Court must presume that what was done was properly done.—[FITZGERALD, B. We have no-

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(a) 10 Exch. 88.

(b) 9 C. & P. 83, and *ibid* 238.

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thing to do with it one way or the other.]—And my argument is this—if this man was an approver, who promised to give evidence, and then refused to give it, his deposition would be plainly, on authority, admissible against him. Now, how does that element of having refused to perform the obligation on which he was accepted as an approver—how does it come before the Court? In *Rex v. Burley* (a) the reasonable inference appears to be that what was given in evidence against the prisoner was a deposition he had made. If it was a confession not on oath, it is a more favourable authority for me than if it was on oath; for it is quite plain that if the admission was made in the hope of being admitted as an approver, and after the promise that he would be received as an approver, it is the ordinary confession made by a person in custody; it is perfectly plain that, but for the element that he afterwards refused to carry out the duty of an approver, by giving the evidence, it would be excluded.—[FITZGERALD, B. Surely, if that be so, it must be proved that he refused to give the evidence.]—The doctrine of a modern accomplice is a substitution for the old principle of approver.—[FITZGERALD, B., referred to *The King v. Rudd* (a), decided by Lord Mansfield, and in which a confession seemed to be treated as inadmissible.]—The question is, whether the modern practice of receiving informers is not in some respects a substitution for the system of approvement; namely, that a man is not allowed to become an approver except on an implied understanding, honestly carried out, that he would convict his co-criminals: 2 *Hale, Pl. Cr.*, p. 226; *Rex v. Warrickshall* (b).—[FITZGERALD, B. Are there not two questions for us?—first, the state of the man's own mind; was he under the influence of hope or under the influence of fear? And then, if he was, was that induced or occasioned, if not by express words, at least by conduct and acts by a person in authority?—The right inquiry is not whether the effect was produced in the man's mind; but, was what was done reasonably calculated to produce it? and that involves the consideration of what was done. The mere existence of a hope, without

(a) 2 St. T. 13.

(b) 1 Leach Cr. Cas. 118.

(c) Leach, 263.

something reasonably to excite it, would operate in every case of an accomplice.

Upon the whole, therefore, on either of two principles, this confession ought to be received: first, taking this man to be an accomplice, the Court must assume that he was rightly put on his trial; and next, that being an approver, once you assume he is properly put on his trial, the consequence of that is, that he is just in the same position as an approver would be in old times, and liable to have his own admissions given in evidence against him. That of course assumes the argument on the other side to be well founded,—that is, that you are to reject this deposition and its admissions, as being made under the influence of a hope or a threat held out by a person in authority. As to that, there is no evidence of it. Further, there could not be any; for this man was not in custody; there was no charge against him; and therefore, within the class of authorities referred to, there was no person here who had authority to influence this man. The hope in the man's own mind, created by himself, is to be distinguished from the inducement held out by a person in authority over him. There being no custody, there can be no confession to be excluded on the points raised on the other side.

Butt in reply.

The real question is this—is the mere fact of a police constable, engaged in getting up prosecutions against others, saying to a person who acknowledged his complicity in the crime, “Crown down, and give information as a witness before a Magistrate,” such an inducement as makes the evidence inadmissible afterwards against him? The mere fact of directing a man to be a witness against others, not an ordinary witness, as has been said on the other side, for he was not an ordinary witness, but asking him to criminate himself and others, was an implied inducement; a promise held out that the man would be taken as Queen's evidence, carrying of necessity to the man's mind the assurance that he was safe in any confession that he made. It is not necessary for me to consider Baron Gurney's decisions. He was of opinion that the mere fact

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of a man being examined, as an accomplice, on his oath, excluded that evidence against him on a criminal trial. On the one hand, it is said, the moment a witness comes as a witness he is under the obligation to tell the truth, and under compulsion to tell the truth; and the ground of the rule is this, that British law will not tolerate the extorting of evidence from a man against himself; it is not merely the danger of getting a false confession; but for the sake of maintaining the great principle of British law intact, since torture was abolished, of not suffering any evidence to be extorted from a man to procure his own conviction. But it is said it is not so unjust. You are presumed to know the law; you must protect yourself; there is no compulsion to criminate yourself. The only use of this statement being made on oath is this,—the statement, being made on oath, as a witness against others, in its very essence carries with it the presumption that he was a witness, and therefore had the promise of security. That is the only reason. It is not the fact of its being sworn or not that gives it value, but the fact that it is made in a judicial proceeding where he is actually admitted as a witness. The object of the rule is, not to control prisoners, but to control persons in authority. I admit that we have not a right to inquire why the Attorney-General put him on his trial; but then there may be a great many reasons why the Attorney-General should put him on trial, even although he may have been perfectly willing to come forward and give evidence. Suppose it was discovered that part of the confession falsely accused persons. If it is receivable, it is receivable if he kept his promise; if it is not receivable, it ought to be rejected whether he broke his promise or not. The moment the man confessed he was a traitor, it was the duty of the constable to arrest him; from that moment the constable had authority over him; and the inducement therefore held out by the constable, or rather by the superintendent to whom he was brought, was an inducement held out by a person in authority. In *The King v. Burley*, no suspicion attached to the party. Here, not only was there suspicion, but the strongest proof of guilt on his own confession. In that case the Judge said there was no charge made. Here, there was a charge

made by the man himself—it matters not who makes the charge; and from the moment Mr. Ryan knew that this charge was made, he became a person in authority over him. How can it alter it because the charge was made by himself? I say it is just as strong as if a person came in from the street, and said, “I know this man to be a Fenian.” That would give Mr. Ryan authority; but when he came himself and said, “I am a Fenian,” probably it makes the case even stronger. The Law of Approvement has nothing to do with it. The Law of Approvement was a very peculiar one. In old times the first step was, the party came in, and pleaded “guilty.” When asked why sentence should not be passed, then he interposed, with the assent of the Crown, and undertook to convict an accomplice. There was then a prosecution of “appeal,” and the man was considered to have done a service to the State, if in that prosecution he convicted an accomplice in guilt, and he was let go.—[Mr. *Walsh*. He was hanged if he did not succeed.—FITZGERALD, J.—He had an absolute right to a pardon if he succeeded.]—If he succeeded on “appeal” he had. He had the absolute right to bring the appeal; and it was nothing more than a private prosecution; and, if he convicted the party, he was relieved from the indictment and sentence against himself. The question of inducement is wholly distinct from that of being in custody. There may be particular cases where men, being in custody, the custody is an essential element; but, where it is a mere question of inducement—of tampering with a man—then his being in custody or not does not make the slightest difference. The prisoner was bound over to prosecute on the 27th of September; and that binding of him over makes it impossible to say that he was not received as King’s evidence, having regard to the fact that he had disclosed that he was himself an accomplice.—[FITZGERALD, B. If it was a perfectly voluntary binding over, that does not alter it.]—The Magistrate binds you over to prosecute. That is an absolute declaration on your part, as well as on the part of those in authority, that you are to be as a witness. The binding over of the 27th of September was a distinct declaration that the man was not merely giving evidence then, but that it was intended to use him at the

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trial as a witness.—[FITZGERALD, B. If it was voluntary, was it not all right?—That it was a statement that they intend to produce him on the trial, and from that moment he was accepted as King's evidence.—[FITZGERALD, B. Why more than in the case of any other man, who, having made a voluntary statement before a Magistrate, is bound over by the Magistrate, in the ordinary discharge of his duty?—“Voluntary” is not exactly the accurate word to apply, if he makes it in the hope of protecting himself. I put it on the natural effect of producing a man as evidence for the Crown. If a man comes to the Crown Solicitor, and says, “If such a man is prosecuted for murder, I am ready to come on the table and give “evidence,” and nothing more is said, and the Attorney-General then examines him as a witness, the evidence given at the trial is clearly given under such an inducement as to render it impossible that it could be used afterwards against himself. Well, here the man is bound over to prosecute, with a perfect knowledge on the part of those binding him over that his evidence implicates himself, and that, if that evidence is to be given at all, it is to be given as the evidence of an approver; the calling of the man not being his own act, but that of the Attorney-General, who would call him, knowing that his evidence must convict himself, that mere calling is holding out such an inducement as to prevent the evidence being used. The man may charge himself, it is true, by his own voluntary statement; but from the moment he is accepted by the Attorney-General as King's evidence, the statement against himself is excluded. By binding him over, they have by these acts implied the promise. He was bound over on the 27th of September; and on the 2nd of October he comes up again, makes an additional statement, and is re-sworn to it. There was then the most distinct understanding between him and the Attorney-General, and the police, that he would be used as a witness on the trial. Supposing the information of the 27th of September to be perfectly admissible, and to be a perfectly voluntary statement made by him before the Magistrate, subject to the point Baron Gurney raised, and which I do not at all give up, then that information might be received; but the moment you bound him over on the information the next time

you make a declaration to him that he is a Crown witness, which I submit would imply an inducement sufficient to make in future his evidence against himself inadmissible.

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O'HAGAN, J.

This is a case reserved by my Brothers KEOGH and FITZGERALD, from the recent Special Commission for the city of Dublin. I shall state the evidence, on which the question for our decision arises, from the report of my Brother KEOGH.—[See case in statement.]—For the clearer understanding of my judgment, I may say, at once, that it will proceed mainly on a consideration of the first of the objections stated by the learned Judge. I do not think, that the mere fact of the information having been on oath would have rendered it inadmissible, if it had been made voluntarily and spontaneously and without any manner of inducement of hope or fear. In my view, the whole question hangs on the objection, that it was made under the expectation that the prisoner would be accepted as an approver, and so relieved from the penal consequences of his guilt.

June 7.

Very many cases have been cited for the prisoner and for the Crown, but I do not embarrass myself by the consideration of them, individually; they all result in, or are entirely consistent with, the doctrine, which I take to be one of the honourable characteristics of our law, that a self-criminating statement cannot be made evidence against a prisoner, if he has made it under any influence of hope of advantage, or fear of injury. The principle has been expressed authoritatively:—"A confession is not admissible, unless it be made freely, voluntarily, and not under the influence of promises or threats. . . . A confession forced from the mind, by the flattery of hope or the torture of fear, comes in so questionable a shape that no weight ought to be given to it" (a). It is to be added, as a qualification of this principle, that the intervention of some "person in authority" holding out some inducement, in the way of threat or promise, is said by Patteson, J., in *Regina*

(a) 2 L. C. C. 122.

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v. *Taylor (a)*, professing to give the general view of the Judges, to be necessary to render a confession inadmissible in evidence. On this point there seems, notwithstanding that statement, to have been a good deal of difference of opinion, some of the Judges holding, according to Lord Wensleydale, that a confession is not receivable after inducement, even from a person not in authority: *Rex v. Spencer and another (b)*. But it appears to me, that, in either view of the law, the informations received in the present case were inadmissible in evidence; and I do not, therefore, pause to consider the grounds of the controversy.

I put the question thus:—Was the prisoner induced, by a person in authority, to make the information criminating himself, on which the Crown has relied, by the hope of obtaining the immunity of an approver? I think he was; and that the informations were, therefore, improperly submitted to the jury; and, I confess, I should have no doubt whatever in this matter, but for the high respect in which I hold the judgment of some of my Brethren who differ from me, and, I believe, from the majority of the Court.

This was the prisoner's position when he made the information:—The police came to his forge, and, of his own accord and voluntarily, he stated that he had let it to Michael Moore, a blacksmith, and that pikes were made in it; that he had attended a Fenian meeting at which there were seventy-five officers; and that he was "a serjeant in the society." All this he said, without any inducement whatever, and the statement was given in evidence without objection, and might have been sufficient of itself to secure a verdict against him. But the police were not content with his single conviction; and, having heard the confession of his guilt, the constable asked him to repeat it to the superintendent; and the superintendent having also heard it, asked him, if he had any objection to give information before the Magistrate, and be a witness; and he said he had none. He went before the Magistrate accordingly, detailed his own complicity with the conspiracy, and that of others, was interrogated and pressed for further evidence, without any caution, and disclosed fully the entire case against himself.

(a) 8 Car. & P. 734.

(b) 7 Car. & P. 776.

Now, in the first place, when all this occurred, he was virtually in custody; he had avowed his guilt; he was in the power of the police; it was their duty to arrest him; and, if he had refused to give evidence, they would, undoubtedly, have done so. In the next place, he was solicited so to give evidence, by a person having authority instantly to arrest him, and give him up to justice, if he hesitated to swear against his confederates; and, finally, can there be any doubt that he became a witness—a Crown witness—with the hope and in the reasonable expectation that he would escape punishment, in consideration of his accepted service of procuring the conviction of others, by the very testimony which has been used to convict himself? If this was so, and I can see no ground for doubting any one of the allegations I have made, then the prisoner made his admission, under the inducement of hope, administered by a person in authority; and that admission, procured in that way, is not, in my opinion, receivable in evidence against him, whatever may have been his subsequent conduct, or however much the Crown may have reason to complain that he did not fulfil his contract and depose, before a jury, against his fellow conspirators.

But, there is more in this case. In the prisoner's further information, sworn on the 27th of September 1865, and given in evidence, he is asked, on cross-examination, "What brought you here?" And he answers, "Two of the detectives dragged me here." And he is further asked, "How much do you expect for this job?" And he answers, "I swear I expect nothing; I came to save myself." These replies indicate, clearly enough, his conception of his position as a person in the power of the police, and the motive which prompted him to make the information. No doubt, as has been argued at the Bar, we are not bound to accept all his statements; but we are to consider how far they are reliable; we are to take the place of the learned Judges, who presided at the trial, and determine, fairly, as to the nature of the influences which operated on his mind and the result which they produced. For myself, I have no doubt whatever that he told the simple truth when he said, that his object was "to save himself;" and I have as little, that he expected to accomplish that object, because he had

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been solicited by the superintendent to become a Crown witness or approver, with all the implied and well-understood security and privileges of that position. And if I had any doubt on the point, it would be removed by Mr. Stronge, the Chief Magistrate, who swore, that although, at first, he was treated as a witness, in the ordinary sense, on the occasion of making his second information, he was considered and dealt with "in the nature of an approver." The Magistrate gave him "no caution whatever," whilst he was criminating himself, in reply to the questions put to him from the Bench. And the prisoner was not cautioned, because the Magistrate "did not consider he would implicate himself;" manifestly, on the single ground, that the evidence he gave of his own guilt could not be used against him, because he *was* an approver. So that, we have not only the prisoner's own declaration of his hope of safety, suggested by the solicitation of the constable, but also the testimony of the Magistrate that he, too, believed that hope well-founded, and shaped his conduct on the assurance that it was so.

Therefore, it seems to me that the information should not have been received; because it was made under the implied promise, and the consequent expectation, that it would secure the prisoner's escape from punishment. I do not ground this opinion merely on his hope. It was fairly argued, that a confession is not inadmissible, because the maker of it forms and acts upon such a hope. But when the hope is the reasonable result of a communication from a person in authority, as I take the superintendent clearly to have been, the confession which follows is not, in my judgment, receivable. Neither would I be understood as resting on the decisions of Baron Gurney—*Rex v. Lewis (a)*; *Rex v. Owen (b)*—and of some other Judges which appear to have proceeded on the principle that a deposition made upon oath, when the witness had been sworn to tell the whole truth, cannot be admitted against him, as he was not, in making it, an entirely voluntary agent. I do not think that a deposition, so made, is necessarily inadmissible, if it was made spontaneously and without invitation or inducement, the witness having a legal right to refuse to criminate himself. But,

(a) 6 Car. & P. 177.

(b) 9 Car. & P. 83.

we are not bound to consider the propriety of the decision to which I have adverted; for we have here, in my opinion, the additional elements of invitation and inducement breeding the hope of benefit, which, of themselves, should exclude the confession.

So, I think the case before us is stronger to necessitate its exclusion than that of *Rex v. M'Hugh* (c), in which this Court held a deposition inadmissible. There, the prisoner was in custody, and charged with an offence; but he was not asked to become a witness, although he did become so, and was so accepted. Here, the prisoner was not actually arrested, but he was virtually so; he was in the hands of the police, and he knew that they would put him in prison if he did not become an approver. Here, he was not formally charged before a Magistrate, but he had charged himself on his own statement, and supplied the evidence for his own conviction. And here, he gave his testimony at the express request of those in authority, and with no imaginable motive but that of making himself safe. The reason for excluding the information seems to me *a multo fortiori*, under the circumstances with which we have to deal. And this, especially, when we remember, that whilst our law, forbidding any man to be entrapped unwarily into a self-condemnation, provides that, before the examination of an accused person, he shall receive a solemn warning that he need say nothing to criminate himself, but that, if he choose to do so, his evidence may be used against him; in the case before us, contrariwise, not only was no caution given to the prisoner, although the police knew that his statement would involve a clear admission of his membership in a treasonable confederacy, but that admission was actually drawn from him in detail, by the searching interrogatories of the Magistrate. Such a proceeding would appear to me to have been quite unwarrantable, save on the supposition which Mr. Stronge swears he made, that the prisoner was "in the nature of an approver;" and that his testimony would not, therefore, "implicate himself." Our juridical system is distinguished from those of many other countries, in which, though physical torture be abolished, it is thought fit and

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proper to extract, from an accused man, proof of his own guilt through judicial cross-examination. They may do these things better on the Continent of Europe; and I am quite aware that there are plausible arguments for preferring their practices to ours; but, at all events, we have never adopted, in modern times, and, for my own part, I trust we never shall adopt, the plan of extorting confessions by putting people, morally, to the question "ordinary or extraordinary." In this case, the course of the Magistrate, I repeat, was only tolerable, on the assumption that the disclosures which he drew from the prisoner would not be made evidence against him.

It has been expressly ruled, that "A confession made with a view and under the hope of being thereby permitted to turn King's evidence is inadmissible:" *Hall's case (a)*; 3 *Russell on Crimes*, p. 373. But we have been much pressed by the argument, that, even though they be so, a prisoner who, after being accepted as an approver, declines to give evidence against his accomplices, may be tried and convicted on his own confession. And to support this proposition *Rex v. Burley (b)* has been relied on. I do not think that that authority affects this case. It merely establishes that, if the approver breaks his bargain with the Crown, he shall not be allowed the benefit of it. The witness and the prosecutor are thereupon relegated to their original relation; and, if the prosecutor can make out his case by legal evidence, whether that be evidence of a confession, or any other, the prisoner must take the consequences. But, the evidence for his conviction must be *legal* evidence; and the confession accepted against him must have been voluntarily made, and without the inducement of hope or fear. That is common sense and common justice; and in this way, the authority is applicable here. The prisoner made a confession, in the first instance, voluntarily, upon no solicitation and with no promise, express or implied, that it would enable him, as an approver, to protect himself. That preliminary confession was given in evidence, without objection, at the trial; and if the case of the Crown had stopped there, and the prisoner had been convicted, his

(a) 2 Leach, 559.

(b) 2 Stark. on Evid. 13.

conviction would have been good. So much *Rex v. Burley* establishes, but nothing more: it in no way justifies us in holding that the information, subsequently made, if made under the influence of hope, suggested by a person in authority, was properly admitted. The principle seems to me clear. An approver should not be allowed to escape because, on false pretences, he has induced the Crown to accept him in that character, and afterwards refused to give his testimony; but, on the other hand, he is not to be found guilty, *because* he has been an approver, on testimony which the law would declare inadmissible against any other accused person.

We have been warned, not to establish a precedent which may be embarrassing and injurious to the administration of criminal justice. In my apprehension, by the rejection of this evidence we shall make no innovation, but act strictly according to the rudimentary doctrines of the law, and the recognised principles by which the Constitution and the Legislature have sought to protect the subject's liberty. It is possible to call into question those principles and doctrines—it is quite possible to argue that they have been pressed too far for the protection of guilty men, whose confessions have made their crimes indisputable. But we are here to administer the law as we find it; and, believing that it requires the rejection of those informations, I should not be deterred from applying it fearlessly, from any anticipation of evil results, even if I had any such anticipation. But I have none. Our decision will not relieve an approver from the punishment of his offences, if he think proper to refuse the evidence he had contracted to furnish, in consideration of escaping prosecution. The moment he does so, he may be put into the dock and tried, as if he had never had any transactions with the Crown, and with all the disadvantages of his disclosures against himself, which will, probably, induce the discovery of independent evidence fully adequate to his conviction. In these circumstances, the approver will gain nothing by his double perfidy; and society, having used his information legitimately against his accomplices and himself, will be nothing the worse because of his false offer of testimony. I am unable, therefore, to entertain any dread of evil consequences from a decision, which

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appears to me to be in full accordance with authority and principle. I am, therefore, of opinion that the evidence should have been rejected, and that the conviction should be reversed.

DEASY, B.

I am also of opinion that this evidence ought not to have been received. The simple ground of that opinion is, that the information made on the second occasion was made under the expectation that, by giving evidence for the Crown, the witness would be relieved of all danger of punishment for guilty acts he had committed; and I think the conduct of those in authority, and their acts and language, afforded a reasonable ground for that opinion. This information having been given under that expectation, and there being reasonable ground for the prisoner to form that expectation, I think it ought not to have been given in evidence against him.

FITZGERALD, J.

I also concur in the result at which my Brother O'HAGAN has arrived, that this deposition ought not to have been received in evidence. I arrive at that conclusion upon the grounds so succinctly stated by my Brother DEASY. It seems to me that the conduct of those in authority led the prisoner to believe that, if he became a witness for the Crown, he would escape from all criminal responsibility. I do not mean, in referring to those in authority, to reflect, in the slightest degree, upon the conduct of Mr. Inspector Ryan or his men. I think, on the contrary, in all these cases there was great fairness, intelligence, and propriety in their conduct. Mr. Ryan's evidence was given with the most perfect candour; and no one reading it can fail to see that he solicited the prisoner to repeat his statement on oath, with the view that if he yielded to his request he was to be received as a Crown witness, in the ordinary sense, and upon the ordinary terms. In speaking of Ryan as one in authority, I adopt the grounds put forward by my Brother O'HAGAN; and, in addition, it appeared at the trial that in fact he was the officer who had charge of these criminal prosecutions. There were some thirty or forty persons in the custody of

the police. The police were looking for evidence; they brought this man in that light before the Magistrate. I therefore come to the conclusion that the prisoner was not a mere voluntary witness, but that his statement was induced by those in authority. It was said he came forward as a witness—as one of the community—to give his testimony on oath, touching these matters. But if, in place of coming forward as a Crown witness, he was brought as a simple witness in the ordinary way, he might have stated, at the first outset of the examination, “these questions may criminate me; they may be just the links in the chain that will criminate me.” In place of thus protecting himself, the prisoner having been asked to become a Crown witness, makes a full and clear statement; and that statement such as clearly to implicate him.

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One case has been referred to, which is directly in point—namely, that of *The Queen v. M'Hugh*. I am unable to distinguish it from the present case: this case is indeed in some respects stronger. M'Hugh received no inducement; he sent for the Magistrate; he requested the Magistrate to take his information; and all that without any solicitation. The only fact essential is, that M'Hugh was in prison; but, although the fact of his being in prison is to be considered as tending to show that the party was under pressure at the time, yet there is no case to show that imprisonment is an essential ingredient to render the statement or confession inadmissible. Everything short of imprisonment existed in this case to influence the prisoner's mind, as my Brother O'HAGAN has pointed out. The man knew who the police were; that he was within their power. The absence of the fact of actual imprisonment is not sufficient to distinguish this case from *The Queen v. M'Hugh*.

HUGHES, B.

I am of opinion that this conviction cannot be sustained. My Brother DEASY has very shortly stated reasons for that opinion; and in those reasons I concur.

FITZGERALD, B.

I have, though I confess after much doubt and hesitation, come to the same conclusion as the Judges who have preceded me, as

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regards the information sworn, or rather re-sworn, with certain corrections and additions, by the prisoner, on the 2nd of October 1865. The ground on which the admissions against himself, by a party to a suit of matters in issue are received in evidence, seems to be the same in criminal and civil cases—the presumption, namely, that a man will not admit untruly what is plainly opposed to his own interest. When to this presumption is added the consideration that the admissions are made under the obligation of an oath, there certainly appears great difficulty in wholly rejecting such admissions as evidence. Unquestionably, however, our law does make a well-recognised distinction on this head between civil and criminal cases. In civil cases, matters which have a tendency, greater or less, to weaken or destroy the presumption on which the admissibility of the evidence is grounded, are held only to affect its weight, but never to exclude it. In criminal cases there are certain matters having such tendency, which will wholly exclude the defendant's admissions of the offence with which he is charged; but all other matters having such tendency will not, even in criminal cases, operate wholly to exclude them. In every case in which the question, whether the evidence is or is not wholly to be excluded, arises, that question resolves itself into two—a question of law and a question of fact, both of which must be determined by the Judge. The question of law is, what are those matters the existence of which is necessary to exclude the evidence? The question of fact is, whether those matters do or do not exist in this particular case?

Without citing authority, I think I may lay it down as clear that, in cases of the class to which the present belongs, in order to exclude the evidence, there must in general be at the time when the admission is made, first, the existence of a charge, or at the least a suspicion against the party of his being implicated in the offence which is the subject of the admission; secondly, the presence of a person having some authority over the party, arising from the existence of such charge or suspicion—as, to apprehend, to prosecute, to examine; and, thirdly, there must exist facts from which there is reason to infer that the admission was made under some inducement of hope or fear, suggested or sanctioned by such “person in autho-

rity"—hope, that the party's position in respect of the charge or suspicion may be bettered by confession—fear, that it may be rendered worse by not confessing. With reference to the question of fact, however, it would seem to be essential that, whenever the confession appears to have been made to or in the presence of a "person in authority," the prosecutor must negative the existence of any express promise or threat on the occasion; otherwise the evidence will not be admissible. I think it also reasonably clear that, whenever the three matters therein mentioned do exist, the evidence must be excluded. In the present case the prisoner was indicted, amongst other things, of the treasonable felony, of compassing to depose the Queen; one of the overt acts charged being the conspiring and agreeing with others to be members of a society called the Fenian Brotherhood, having for its object the overthrow of the Queen's power and authority in Ireland. At least three distinct confessions by the prisoner, of his implication in the conspiracy charged, were received in evidence against him on his trial, the two last being on oath. The first was made to a constable, on the 26th of September 1865, while that constable was engaged in searching a forge belonging to the prisoner, for arms. At the time of this confession, no charge had been made against the prisoner; nor, so far as appears, was any suspicion entertained by the constable, or intimated to the prisoner of his implication in the conspiracy which was the subject of the confession. The confession made was in a statement which implicated others named as well as himself. It has not been contended that this confession could have been excluded as evidence on the prisoner's trial. It does, however, seem plain to me that, from the moment that confession was made, two of the matters which I have already mentioned as essential to exclude evidence of confession in criminal cases, existed as between the prisoner and the constable. From that moment the prisoner was, by reason of the confession itself, under a charge or suspicion of the crime confessed; and he, by the same confession, placed the constable in a relation of authority to him within the meaning of the law. The constable positively denies the use of any inducement whatever to the prisoner; he was not apprehended; but the constable left him at

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liberty in his own place, so far as appears. On the next day the constable returned, and asked the prisoner whether he was willing to make the statement, already made to himself, to his superintendent. The prisoner at once assented. There appears to have been no expression of hope or fear on his part; and the holding out of any inducement on the other is positively negatived. The prisoner then went, and, so far as appears, quite voluntarily, with the constable, to the superintendent. To the superintendent, who also positively denies the holding out of any inducement whatsoever, the prisoner made a statement, of which the particulars do not appear, but from which he understood that the prisoner was implicated with others in the conspiracy charged in the indictment. Here again the prisoner, knowing himself to be charged with or suspected of guilt, by reason of his own confession, was in the presence of one having, as it appears to me, authority over him, arising from that confession; but, though I cannot help concluding that he must have had some motive in so placing himself, and thinking it most probable that such motive respected a merely temporal interest of his own, I have no means of discovering its nature further—still less of determining that it was known to the officers; and, in the absence of such knowledge on their part, I see no mode of treating their conduct as a sanction of it; even if it were not further necessary to the holding it such sanction, that the officers' knowledge of what was passing in the prisoner's mind should be known to him. The superintendent asked the prisoner whether he was willing, as a witness (which of course would mean on oath), to make to a Magistrate the same statement as he had already made to himself; the prisoner answered "yes;" and they went together to a Justice of the Peace, to whom the prisoner was presented as a witness in support of the charge of treasonable felony against others, who were not, however, then present. When the prisoner was so presented as a witness, the Justice was not told that he was implicated in any way in the charge of felony; and treating him, in the first instance, as an ordinary witness, examined him by questions, and took his answers in the shape of an information, on oath, on the same day, the 27th of September 1865. That information was also received in evidence at the trial;

and it is impossible to read it without seeing that the Magistrate must have persisted in questioning the prisoner after it was apparent that his statements seriously implicated him. The Magistrate gave him no caution, and did not apprise him that he was not bound to implicate himself, but positively denies that he held out any inducement. With regard to this information, it was strongly urged, on the part of the prisoner, that the thus asking a known accomplice to be a witness against his fellows, the then presenting him as a witness, and having him examined as such, must be considered by the Court, in connection with a known usage, that an accomplice, accepted by the prosecutor or Justice as a witness against his fellows, is, if he gives testimony, fairly warranted in expecting relief from prosecution; and that, so considering it, the information must be considered as made under the inducement of persons in authority. I have not been able to satisfy myself of this. I am not indeed prepared to say that we can or ought to shut our eyes to the existence of an usage with respect to accomplices received as witnesses on the part of the Crown. But I apprehend that cases within that usage are cases in which there has been either a direct expression of expectation on the part of the proposed witness of benefits, acquiesced in by one in authority, or a direct proposal of the benefit by some one in authority, and of which an understood condition is, that faith shall be kept on the part of the witness. The usage which creates the hope supposes a dealing too specific in its terms to be implied by the party from the mere asking him whether he will, as a witness, repeat a voluntary statement already made, and, on his assent, proposing him as such. There must be, I think, at the least some intimation by the party to become a witness, that he is actuated by the hope or expectation, even though there should not be a direct encouragement on the other. To treat the conduct in this case of the superintendent or the Justice as sanctioning an expectation of that immunity which is recognised by the usage, there must, I think, be something to show that the existence of that expectation in the party's mind was intimated to them before he was proposed as a witness. It seems to me indeed plain that, wherever that state of things exists which would warrant us in considering the usage as an

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element in the question to be determined, the party's confession never can be given in evidence against him, even though he breaks faith; and this I understand to be the view of Lord Mansfield and the Court of King's Bench in *Rudd's case* (a), as well as of the Judges who afterwards considered the case of that prisoner, and tried her. The question there was, whether she was within the usage, by reason of what had taken place; not as here, whether her confession could be given in evidence against her: and I may observe that Lord Mansfield relies on her not being in custody as strong evidence that she was not treated as an approver, even though there, as here, the Justices swore that they treated her as an approver. I have not satisfied myself that the being in actual custody is essential in the present case to exclude the admissibility of the confession; but it does seem to me an important consideration, when we are asked to import the usage into the matter to be determined.

I have not therefore been able to come to the conclusion that the information of the 27th of September was inadmissible. *Davis's case* (b) would no doubt be an authority for the prisoner on this head; but it is a Circuit decision—for which no reasons are given—opposed by more than one Circuit decision, and by the reasons which I have stated. The decision in *M'Hugh's case* (c) is not subject to that observation, though it is one in which, from the report, I should have felt some difficulty in acquiescing; but it does not appear to me to lay down any principle of law applicable to this point of the case: it is, I think, to be regarded as the conclusion in fact of the Judges who decided it, from the circumstances that the prisoner was within the usage as to approvers.

The case, however, appears to me very different as regards the third confession, when evidence was given before the Magistrate, then fully aware that the prisoner was implicated by his own confession, in the presence of the parties charged, and when the witness was cross-examined. I have, on that occasion, what

(a) 1 Leach, 115; S. C., Cowp. 331.

(b) 6 Car. & P. 177.

(c) 7 Cox, 483.

strikes me as sufficient evidence of the states of mind, both of the Magistrate, and the prisoner, and of the knowledge which each had of the state of mind of the other, the Magistrate considered him as an approver; that is, as I understand it, as one stating what he did state in the expectation of immunity. The Magistrate, being under that impression, naturally took no step to remove that expectation, or to give any caution with respect to it; and, though that alone could not be considered as operating on the prisoner's mind while the state of the Magistrate's mind was unknown to him, it does, as it seems to me, become material as soon as the state of the prisoner's mind was openly communicated to the Magistrate. The prisoner distinctly stated, in the presence of the Magistrate, that he was giving his testimony to save himself. I cannot but think that, after that, to make the prisoner's confession admissible, a caution was necessary. The Magistrate, not cautioning him, must be considered as sanctioning the expectation, and have been so considered by the prisoner. It is quite true that the statement of the prisoner's expectation was not made to the Magistrate until after a statement of all the matters which affect the prisoner. It is true also that I am unable to satisfy myself that, till then, there was any sanction on the Magistrate's part of the expectation. But this does not appear to me to alter the case. The prisoner's statement of his expectation is a part of the whole statement: he closed it with the Magistrate's sanction of that expectation: and I cannot, speculate how or in what way he might have modified his evidence, if he had then been cautioned against the hope which he entertained.

On the whole, therefore, it seems to me that I must put the whole deposition made on the 2nd of October as a confession made by one under suspicion of the charge—confessed and made under the influence of hope, with reference to the charge, sanctioned by a person in authority then present.

O'BRIEN, J.

In this case I am also of opinion that the informations in question (as well that which was only sworn on the 27th of September, and

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re-sworn on the 2nd of October, as also that which was sworn on the latter day) were improperly received in evidence; and that, therefore, the conviction should be reversed. It is true that no *express* inducement or threat was held out to the prisoner before he made those informations; but I think it clear that what passed between the prisoner and Mr. Superintendent Ryan, previous to the information of the 27th of September, amounted substantially to a promise on the part of Mr. Ryan, that if the prisoner made an information to the same effect as he had verbally stated to Ryan, then that the prisoner would be received as a witness for the Crown. Mr. Ryan, in his evidence at the trial, after referring to his conversation with the prisoner, and stating that he had not cautioned him, goes on to state:—"I knew from his own statement that he 'had been implicated in the conspiracy—from his own voluntary statement. I then asked him was he willing to make that statement before the Magistrate; and it was to be as a witness?' 'he said, 'yes.'" The prisoner then made his first information before the Magistrate, Mr. Stronge, who stated, in his evidence at the trial, that at the making of the first information he did not look on prisoner as an informer, but treated him as a Crown witness, in the ordinary sense; that on the occasion of the second information he did not consider the prisoner in the nature of an approver; and that he did not caution the prisoner on either occasion. I agree with the proposition contended for by the Crown Counsel, that in deciding whether the evidence of a prisoner's confession or statement should be rejected on the ground of its having been made in consequence of inducements held out, we should not act upon what merely may have passed through the prisoner's mind as to the advantages likely to result to himself from making such statements, but that we should consider whether what actually passed warranted the prisoner in expecting that if he made such statement he would be benefited by it. In the present case, it is clear that the prisoner was warranted in assuming that if he made the information he would be received as a Crown witness; and indeed Mr. Ryan very fairly states in his evidence, "I understood him to go before the Magistrate as a witness, and have no

"doubt he understood the same." I do not rest my judgment upon the supposition that the prisoner was in custody at the time. I think the evidence shows the contrary; but I think that the circumstances in which prisoner was placed at the time he made the information gave additional weight to the inducement held out to him that he would be received as a Crown witness; and to the objection to, the admissibility in evidence of the information upon the ground of such inducement. The prisoner had previously made, both to Constable Smith and to Mr. Ryan, a verbal and voluntary statement, which showed that he had been engaged in a treasonable conspiracy, and which would have warranted Mr. Ryan in arresting him for felony. The inducement held out by Mr. Ryan is, therefore, to be considered as having been held out by "a person in authority," within the meaning of the rule as to the effect of such inducement. And the promise to receive the prisoner as a Crown witness clearly implied that he was not himself to be prosecuted. I have no doubt that it was so understood by Mr. Ryan himself, whose conduct on the occasion appears to have been perfectly fair and unexceptionable.

It has been urged by the Crown Counsel that this implied promise was made upon a condition, which the prisoner afterwards violated by departing from his information and making contrary statements on his oath; but, although that circumstance justified the Crown in subsequently putting him on his trial, it does not remove the objection to the admissibility of the information in evidence, on the ground of its having been made under the inducement held out at the time. And I may observe that the verbal statements which the prisoner had previously made to Mr. Ryan and to Smith, and which, having been voluntarily made by him, were received in evidence without objection, would have furnished sufficient proof of his guilt.

The Crown Counsel have also urged that, whatever inducement may have been held out to the prisoner, it is not to be supposed that he would have accused himself of a crime which he never committed. This argument has been frequently pressed in similar cases; but, as stated by Lord Campbell, in *Baldry's case* (a), "The

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(a) 2 Den. C. C. 327.

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"rule excluding confessions, made in consequence of inducements
"held out, did not proceed upon the presumption that the confession
"was untrue, but rather that it would be dangerous to receive such
"evidence; and that, for the due administration of justice, it was
"better that it should be withdrawn from the consideration of the
"jury."

The authorities on the question before us have been so fully
stated in the judgments of some of my Brethren who preceded me,
that it is not requisite for me to refer further to them.

KROGH, J.

In this case I have the misfortune to differ from the Members of
the Bench who preceded me; and as, in connection with my Brother
FITZGERALD, I had the misfortune—for such of course it was—to
preside at the Commission when this case was tried, I shall go at
greater length into the facts of the case than has been done up to
the present. I shall take the facts first; then I will venture to apply
the law, as it appears to me, to the facts, rather than first taking the
law, and then fitting to it the facts. Now, this case is remarkable
in more aspects than one. If this information had not been tendered
in evidence at all—assuming that the jury saw no reason to doubt
the oral evidence in the case,—there cannot be a doubt entertained
that the prisoner would have been convicted, and indeed that was
rather conceded at the trial. The circumstances were peculiar.
The case was opened against the prisoner, stating the information;
the prisoner's Counsel, when the information came to be tendered,
objected to its reception. It was perfectly open then to those who
acted for the Crown to have yielded to the objection—to have
withdrawn the information; and then the case would have stood
upon the oral admissions, not distinguishable in any way from the
written ones, as to which there was no controversy, and which were
equally strong against the prisoner as anything that appeared in
the information. The Crown might have taken that course; but I
must say of those acting on the part of the Crown, that taking the
same line of conduct which distinguished them throughout the
whole of these trials, having opened the case against the prisoner

from the informations, under the peculiar circumstances, they felt that they ought to give him any benefit which was to be derived from putting them in evidence, and accordingly the informations were put in. Let us see how these informations came to be taken. The "prisoner"—I call him so for the purpose of the inquiry, though it might lead to some misapprehension to call him so, because when he made his information he was undoubtedly not a prisoner—was a person residing in Dublin, and he had a store, or back-yard, or something of that kind, where he carried on business himself; and information having been given to the police that a person named Moore, and others, had opened a forge in the house or in some part of the premises of this man, Gillis, where they carried on the trade of pike-making; upon that information the constable went to the yard belonging to this man, and asked him whether there was a forge upon his premises—the charge to be made against Moore, and against the others associated with him, and I think this is of importance, being that of pike-making. It was not a charge against the prisoner, as he afterwards became when sent for trial, but against other persons altogether—a charge of pike-making. He was asked whether he had a forge on his premises, and the constable (Smith) says:—"He at once went to the door and opened it, and admitted us to the forge. He said 'he had let the forge to Michael Moore, who he knew was a blacksmith, and that on the following Monday he brought in three other men, whom he named. He told me the way they were making pikes, and how they were sent out. I left, and returned again on the morning of the 27th. I asked him, 'Are you willing to come down and state what you stated to me to my superintendent?' He said, 'I am.' He thereupon put on his coat, and came along with me. He did that perfectly voluntarily. I did not hold out the slightest inducement or threat to make him give evidence. He told me that on one occasion he carried fifty pikes to a man at the corner of Mark's-alley. He told me that he attended a Fenian meeting at a house kept by a man named Phibbs, at the corner of Patrick-street," &c. Well, the constable says he told him all that, and went with him to state it to the

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T. T. 1866. superintendent, without the slightest inducement or threat having
Crim. Appeal. been held out to him. He was not in custody; he was not arrested;
 THE QUEEN the constable went away; he remained in his own house as he had
v. been before the constable came. Therefore, in the conduct of the
 GILLIS. constable, as there detailed, I do not find, directly or indirectly,
 anything in the way of threat or inducement that could fairly be
 said to influence the mind of this man. On the cross-examination,
 the constable said:—"It was unpleasant to search his place, but
 "that I must do my duty. I did not go to make an arrest. Pri-
 "soner was not in our custody."

That is the whole evidence of the constable. Well, he goes away;
 and on the next morning, as he says, he returned and asked
 him, "Are you willing to come down and state what you stated
 "to me to my superintendent? He said, 'I am.' He thereupon
 "put on his coat, and came along with me. He did that perfectly
 "voluntarily. I did not hold out the slightest inducement or threat
 "to make him give his evidence." He goes down with him then to
 Superintendent Ryan. What is the evidence of Superintendent
 Ryan, as regards anything that passed at his office? Is there
 anything in it that can by the closest scrutiny amount to an
 inducement or a threat? He is in the office of Superintendent
 Ryan. He had gone there voluntarily. The superintendent says,
 "I never held out any inducement or threat whatsoever. I asked
 "him had he any objection to give information, and he said not."

Well, then, what have we? According to the evidence so far,
 the person who made the voluntary statement to the constable, and
 who goes with him perfectly voluntarily, without any threat or
 inducement, down to the office of the superintendent, is asked there
 has he any objection to give information, the superintendent saying
 that he never held out any inducement or threat whatsoever,
 and Gillis says he has no objection. Now, there is a passage
 introduced into the evidence of Superintendent Ryan from which
 some persons might take an erroneous view: it really has nothing
 to do with the case, except by a confusion of ideas, in not reading
 the sentence in its proper collocation. It is this:—"I saw
 "him afterwards in prison, and said, if he would adhere to his

“first information I could serve him.” That is entirely out of the case. It has nothing to do with the case, and it is only put in to give a full narrative of the evidence. Mr. Ryan goes on:—

“I knew from his own statement that he was implicated in the conspiracy—from his own voluntary statement. I asked him was he willing to make that statement before a Magistrate, and it was to be as a witness? He said, ‘yes.’ I then, in the prisoner’s presence, said, ‘Here is a man named Gillis, and would your worship hear what he has to say, and take his information?’” That is the whole of the evidence given by this man, the superintendent; and it certainly is puzzling to my mind to conjecture, within the four corners of that evidence, where there is a single particle that can lead a rational mind to think a threat or inducement of any kind was held out to this man to influence him to give his evidence. Well, that is the testimony extrinsic to the information itself. Now let us turn to the information; but let me again state the charge on which the constable went to this man’s house. It was a charge of pike-making, not against this man at all, but against other persons. He is cross-examined on his information; he is asked who brought him there; and he says, “I was brought here by the police for having my place set.” He is asked, “How much do you expect for this job?” He replies, “I swear I expect nothing; I came to save myself.” “I came”—it is not “I was brought”—it is not “I was compelled”—it is “I came to save myself.” Now I think that of material importance; because I think, when we come to consider the authorities and writings on this most important subject, it will be seen that some of the cases, especially those decided in this country, are owing to a laxity of construction of what is the rule, and the reason of the rule. In the first place, is it to be maintained, as regards these confessions, that they are to be for ever excluded until the Court ascertain, beyond a possibility of doubt, that no motive was operating on the mind of the individual making it of any kind or description? Now I take leave to think, and I believe there is the authority of very eminent Judges supporting my opinion, that that is not only unlikely and difficult to be ascertained, but it is an absolute physical impossibility. I do not believe it is

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possible to suppose a case in which any man ever made a confession for which he had not some motive or another operating on his mind to induce him to do so. But it is not the fact of the motive operating that is material. The motive may be various; it may be of pecuniary gain—of impunity from punishment—it may be a motive of vindictiveness or of revenge—it may be one of the thousand motives, either of hope or fear, which actuate the minds of men; but I say that cannot be the rule. Now, why do I say this? Is all inducement excluded? I speak now of external inducement. Is it the law that, if there is any inducement whatsoever, that that inducement will exclude the confession? No; plainly, on authority, it is not; plainly, upon authority and decisions, the rule laid down is, that the confession is not excluded upon a general inducement. Take this case, for example:—It is settled law that a general exhortation to even a prisoner—and I am now dealing with the cases of prisoners—I shall presently show how this particular case is distinguishable in that respect; but, taking even the case of a prisoner under a charge, is the confession excluded because of that inducement? Clearly not. If there is a deliberate exhortation given to the prisoner by a person in the highest authority, the Magistrate before whom he is brought to tell the truth, it is a settled rule of law that that exhortation will not exclude the confession that is made. Well, I will now take a stronger case; I am now dealing with the question, whether it is the rule of law that *per se* an inducement or influence excludes the confession. Take the case of the importance and weight of a spiritual inducement—an appeal made to a man's religious feelings—a Bible, and the Whole Duty of Man placed before the party, and the clergyman exhorting him, as he valued his future spiritual welfare and salvation, to tell the whole truth. It is impossible to imagine a stronger inducement held out to a man to affect him than that; and yet, through the course of the cases, it is clearly and now irrevocably held that it will not prevail against the confession, and that the confession can be given in evidence; and why? because the Judges have held this—that the operation of spiritual influence cannot be supposed by itself to lead a man to state what is false; there must be present to the

man's mind some motive of temporal welfare—some external influence operating on him—showing that a confession of guilt made in the hope of getting some temporal benefit, such as an exemption from punishment or otherwise, will alone exclude his confession, even although he is a prisoner in custody. The proposition for which I am now contending, that spiritual influence is not to interfere to reject a confession, is decided in *Gillam's case* (a); and, similarly, an exhortation to tell the truth: *The Queen v. Moore* (b).

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Again, for a case where a distinct promise was made with respect to one charge if another was confessed, and the confession not excluded, I refer to *The King v. Warren*, a MS. report, cited in the note to 3 *Russell*, pp. 394–5. I will now read a passage as to the rule, from *Russell on Crimes*, edited by Mr. *Greaves*. Now here is what Mr. *Greaves* lays down in 3 *Russell*:—"The object of the rule relating to the exclusion of confessions is, to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. In determining therefore whether a confession is admissible or not, the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one." Well, passing from that, is there anything in this case to show that this confession, such as it was, did not come from the prisoner himself? It was not in answer to any questions put to him in the first instance; it was not with respect to the charge of which he was afterwards accused; it was as to a charge of perjury-making, not against himself, but against others: and the prisoner is the first that charges himself, when he volunteered to make the statement; and it was only carrying out that voluntary statement that he is brought before the Magistrate, where he again makes the statement, which is ultimately reduced into the form of an information. Now, it has been obstinately held that, if the proposal comes from the prisoner himself, the confession is admissible. That has been

(a) *Rex v. Gillam* (3 *Russ.* 403).

(b) 2 *Denison's C. Cases*, 525; and also in 3 *Russ.* 397.

T. T. 1866. held in a very strong case, cited by Mr. *Greaves* in 3 *Russell*,
Crim. Appeal. p. 398 :—"If the proposal to confess comes from the prisoner, it
 THE QUEEN "is clear that his confession is admissible, although the prosecutor,
 v. "in consideration of his doing so, says he will do all he can for
 GILLIS. "him." Suppose a man has made his own calculation that he
 will derive an advantage by confessing, that is no reason for
 excluding it. He says in his own mind, "I will derive a certain
 advantage by confessing;" that is no reason why the confession is
 not to be received. Why? Because it is laid down by an emi-
 nent Judge that no man can ever make a confession without
 having some motive or reason for doing so. The true distinction
 is this—where the matter rests on a question of interference; might
 he, or might he not, as he thought proper, have made the con-
 fession? And, if it is once established upon the evidence that he
 might have refrained from making it if he thought proper, no
 matter what is the motive operating in his mind, the confession
 can be received, and that even where the prisoner is accused of
 an offence. Now, there is a very recent case of *The Queen v.*
Chidley (a), in which there is a decision by a very eminent English
 Judge on a question exactly similar to that in this case. What
 were the facts of that case?—"Two persons, named Chidley and
 "Cummins, were indicted for maliciously wounding Robert Egg.
 "At the examination before the Magistrate, the prisoner Chidley
 "alone was charged with having committed the offence for which
 "they were now jointly indicted. The prisoner Cummins came
 "forward voluntarily, and confessed that he had inflicted the in-
 "jury on the prosecutor; thereupon both he and Chidley were
 "committed for trial. Miller proposed to put in the prisoner
 "Cummins's deposition. Bulwer objected, on the ground that
 "he was not compelled to make a statement to criminate himself,
 "and that it was made by him voluntarily. Cockburn, C.J., ruled
 "that the deposition was admissible. Cummins guilty; Chidley not
 "guilty."

Now that is a case, I assert, of the very highest authority.
 There were two men in custody, accused of the same offence—

(a) 8 Cox, 365; S. C., 3 Russ. 413.

one makes a deposition exonerating the other, and criminales himself. That deposition is given in evidence against him; and he is convicted. How is that case distinguishable from this? Then come two other cases of value: one is *Rex v. Thornton* (a), which goes far beyond this; the other is *The Queen v. White*, which decides that the answers of a person given in the Court of Bankruptcy, where he might have refused to answer, can be used against him afterwards in a criminal prosecution. Now, take the case of a deposition before the Coroner:—In *Chesham's case* the indictment was for murder. Baron Parke received in evidence the deposition made by the prisoner on oath before the Coroner. The Coroner held an inquest on a person who died by poison; he adjourned the inquest; and on the second occasion the prisoner was examined as a witness, there being no charge made against her. She made a statement on oath, which was taken down in writing. Lord Campbell, after consulting with Baron Parke, admitted the deposition; and the prisoner was convicted and executed. The case is cited by Mr. *Greaves*, who says that Lord Wensleydale has no doubt it is right, though he does not recollect that Lord Campbell consulted him. What is the result of the whole of these decisions? I read now from 3 *Russell*, p. 418:—"It is now clearly settled that, if a party be examined on oath, and has the opportunity to object to answer questions which he thinks may tend to criminate himself, but does answer the questions, such answers are admissible in evidence against him on a criminal proceeding."

Once for all, I say that, in the evidence stated in this case, there is not a particle that, according to the ordinary meaning of the English language (I say this with great deference to those who form a different conclusion), can lead any one to the belief that this man Gillis went before the Magistrate otherwise than as an ordinary witness making his statement voluntarily, without any coercion whatever put on him. Some stress was laid during the argument on this—which I take leave to say is a most absurd proposition,—that we were to assume that there was some sort of implied negotiation between the Crown and the witness. We have

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nothing whatever to do with that. It is absurd to think that we are here to spell out and carry out some implied "honourable understanding" between the Crown and this man: this Court has nothing to say to it. Well, it has been urged that there should have been a caution. But the man was not in custody at all; he was not a prisoner under any charge; and the argument does not apply; but, even if it did apply, what is held:—"It is equally clearly settled, that in such cases it is not necessary that the witness should be cautioned, or put on his guard as to the nature of the questions, to render his answers admissible."—3 *Russ.*, p. 146.

When I regard the evidence of Superintendent Ryan, and the constable who brought this man to him, and contrast it with what was done in other cases, I confess it strikes my mind that these cases are far and away stronger than the particular case under the consideration of the Court. I have now to call attention to this fact, that in all the cases cited the person has been in custody; and it certainly is remarkable that not a single case has been cited, out of all the books, in which this evidence was rejected, where the element of being in custody did not exist. I know the case of *The Queen v. M'Hugh* has been cited. I was one of the Court who decided that case, and I assented to that decision. I do not profess to carry more in my mind of that case than what is supplied by the printed report. In fact, without that, my mind is a blank upon the subject. But I find that a great authority, Baron Pennefather, dissented, and also Justice Moore, a very high authority. But taking *The Queen v. M'Hugh* to be correctly reported, I see no reason to quarrel with it. I do not think it in the slightest degree stands in our way in deciding this case. What do I find there? The prisoner was in custody, charged with an offence: he sent for the Magistrate, and made an information before the Magistrate on oath; the very same Magistrate at the very same time refusing to receive bail for the prisoner, in consequence of the offence with which he was charged. There is no analogy in that to this case. In this case the man is let to remain in his house; the constable goes away, comes back the next day, and he swears that the man came voluntarily with him, without any threat or

inducement, to the superintendent. The superintendent swears the man had no objection to give information; and he is at once introduced to the Magistrate:—"Here is a man named Gillis; would your worship hear what he has to say?" Am I to be told that this is the same case as where the man is in gaol, and where the Magistrate comes to him, refusing bail, then taking his informations, and letting the man remain in custody? It is said that being in custody does not affect the question; but I find it expressly stated by *Phillips*, a high authority, that it does. He calls attention to the custody point as being a marked element in the question of voluntariness or not. He says that suspicion, especially if the party is in custody, will largely operate as constraint, and that statements so made are not as voluntary as if made by a person not in custody. Now, what has been the practice and usage about taking these informations? Why, in the first place, a King's evidence is a person who is accused of an offence; from the earliest time he has been taken in evidence; and if he goes back of his information, from the earliest time to the present hour he has been dealt with, and his information has been given in evidence against him; and he has been convicted, and capitally convicted. The first case I refer to is *The King v. Burley*. In that case the prisoner made a confession, after a representation made to him by a constable, in gaol, that his accomplices had been taken into custody; which was not the fact: he was admitted as a witness against his associates, on a charge of maliciously killing sheep. At the trial, he denied all knowledge of the subject; and he was afterwards tried and convicted on his confession; and the conviction was subsequently approved of by the Judges. Now there, a fraud was clearly practised on the man, yet the confession was used to convict him.

Again, in 3 *Russell*, note v, p. 598, there is this:—"So, where an accomplice was called as a witness against several prisoners, and gave evidence which made all, except one, who was apparently the leader of the gang, present at a robbery, but refused to give evidence that that one was present; and the jury found all the prisoners guilty;—Baron Parke, thinking that the accomplice had refused to state this particular person was present, in order to

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T. T. 1866. "screen him, ordered the accomplice to be kept in custody till the
Crim. Appeal. "next Assizes, and tried for the robbery." That was decided in 1837.

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Again:—"Where an accomplice made a full disclosure of facts
 "attending the commission of a burglary, when before the com-
 "mitting Magistrate, and refused before the grand jury to give any
 "evidence at all, Wightman, J., ordered his name to be inserted
 "in the bill of indictment, and he was convicted on his own con-
 "fession made before the Magistrate"

These are the cases of persons who were in custody—the cases of persons charged with offences—the cases of persons who received no caution whatsoever from the Magistrate; and in one case—*The Queen v. M'Hugh*—bail had been refused by the Magistrate who took the information. But here is a case where a man of his own voluntary motion—there being no charge against him of any kind or description made or pending against him, much less the charge on which he was afterwards indicted, the charge being against other persons who were in custody, while he was not—here, I say, is the case of a man who, so situated, makes a voluntary statement to a police officer—who induces the policeman to make that statement to the superintendent—who goes to that superintendent voluntarily, without threat or inducement—who, with equal voluntariness and freedom from influence, goes before a Magistrate, as a witness, to put the law in motion against other persons,—afterwards he refuses to give evidence; and then we are to hold that there was an inducement, when none appears; that there was a promise, when none was made; in order to let him relieve himself and his accomplices from the punishment due to their offence, because by his act he frustrates the law he was the means of putting in motion. I can do no such thing. No matter what the consequences may be, of course, a man accused of a criminal offence is entitled to the full benefit of the law. But let me say, with the doubt that indubitably I must have, in consequence of so many of my Brethren having a different opinion, that, so far as my intellect enables me to arrive at a conclusion, I am clearly and distinctly of the conviction that this information was rightly received against this man; that he was properly convicted; and that a different decision may lead to the

most disastrous consequences in the administration of the criminal law of the country.

I am therefore of opinion that this conviction should be upheld.

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MONAHAN, C. J.

In this case I have the misfortune to differ from the majority of the Court. The facts have been so fully stated by my Brother KROGH, that it is unnecessary for me to repeat them at any length. It appears from the evidence of the police constable, Charles Smith, that when he went to the prisoner's house on the 26th of September, to make a search, he made a statement admitting his participation in the Fenian conspiracy. No objection was taken on the trial to the admission of this statement in evidence, nor has any question in relation to it been reserved for this Court. The constable, Smith, returned to the prisoner's house the next day, the 27th, and asked him was he willing to repeat to the superintendent the statement he had made to witness the previous day. The prisoner stated he had no objection, and accompanied Smith to the office of the superintendent, Ryan, in the Lower Castle-yard, when, as I collect, he repeated to Ryan substantially the same statement that he had previously made to Smith. Then Ryan asked him had he any objection to repeat the statement before the Magistrate, and that it was to be as a witness. The prisoner stated he had no objection, and accompanied the superintendent to the office of the Magistrate. What so passed between the prisoner and the superintendent was also received without objection. The case of *The Queen v. Johnson*, in this Court, appears to me to be an authority that no objection could be successfully taken to the reception in evidence of the statement so made to the constable and the superintendent. The evidence objected to, and the admissibility of which is reserved for the consideration of this Court, is the information sworn before Mr. Stronge, when the prisoner was brought before him on the 27th of September, and which was re-sworn on the 2nd of October; and I believe also on the cross-examination of Gillis by Mr. *Sidney*, who, I suppose, was Counsel for some of the parties named in Gillis's

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information. Superintendent Ryan states that he held out no inducement or threat whatever to Gillis to induce him to go before the Magistrate as a witness; that he understood, as did also Gillis, that he was going before the Magistrate to swear an information as a witness; that he, the superintendent, said to the Magistrate, in his presence, "Here is a man named Gillis, would your worship hear what he has to say, and take his information?" Mr. Stronge, the Magistrate, says that he held out no inducement or threat whatever; that, when the prisoner came before him on the 27th of September, he was produced as a witness for the Crown, ready and willing to give his evidence for the Fenian prosecutions. Mr. Stronge states that he did not, on the first occasion, look on him as an informer, but treated him as a Crown witness, in the ordinary sense. As I understand, none of the persons accused as Fenians were present when the information of the 27th of September was sworn.

It further appears, from the evidence of Mr. Stronge, that, on the 2nd of October, he was re-sworn to his information made on the 27th of September. Mr. Stronge states that, on this occasion, he considered him in the nature of an approver. As I understand, some Members of the Court are of opinion that there may be a distinction between the information sworn on the 27th of September and that sworn on the 2nd of October; and that what was sworn on the 27th of September may be admissible in evidence, but that what occurred or was sworn on the 2nd of October is not admissible. I confess I cannot see any distinction between the two informations. The only difference between the circumstances under which they were sworn is, that Mr. Stronge says on the first occasion he looked upon Gillis as an ordinary Crown witness, but that on the second he considered him in the nature of an approver; but that in neither case did he hold out any hope or threat. The question then is, if a party not in custody, or charged with an offence for which others are charged, and are in custody, voluntarily goes before a Magistrate, at the request of the constable, and swears an information against the persons in custody, also implicating himself, is the information so made to be received

in evidence against him? The general rule that whatever a party says may be received against him, no one questions. But it is said that this case comes within the well understood exception that, if threats or hopes are held out by a person having authority to carry them into execution, that any statements made by the accused under such inducements cannot be received in evidence. It occurs to me that the evidence in the present case negatives the fact that either the Magistrate or the police superintendent held out any threats or hopes to the party; and that he may have formed an opinion, in his own mind, that it would be for his advantage to make the statement, does not occur to me as a sufficient ground for rejecting the evidence. It is said that *M'Hugh's case*, in this Court, is a decision governing the present. However I may individually doubt the propriety of the decision in that case, if it was expressly in point I would not take it on myself to overrule it; but it occurs to me that that case is distinguishable from the present. In that case *M'Hugh* was a prisoner in custody, charged with the offence in relation to which he gave the information which was afterwards received against him; and it appears, from the report of the case, that it was on that ground the case was argued by *M'Hugh's* Counsel, who distinguished it from the case of a witness voluntarily coming forward, and giving evidence which was afterwards used against him. That case therefore I do not consider as an authority binding the present. This case, I consider, comes within the principle of the cases to which we have been referred, in which a party has come forward before the Coroner on an inquest, as a witness; and the evidence so given has been afterwards used against him; and he has been convicted and executed. In this case, if the party refused to go voluntarily before the Magistrate, the constable might have proceeded on summons, and thus compelled his attendance; and when before the Magistrate, when asked by the Magistrate, or the cross-examining Counsel, any question tending to criminate himself, he might have objected to answering. On that ground, not having done so, it occurs to me the information he then

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T. T. 1866. swore is receivable in evidence against him. I may further state
Crim. Appeal. that, if the prisoner is to be considered in the light of an accom-
THE QUEEN plice, it is for the responsible advisers of the Crown to consider
v. whether he should be prosecuted, as stated by Lord Campbell,
GILLIS. in the case referred to in *Russell*.

On the whole, therefore, I am of opinion that the evidence was properly received, and that the conviction should be affirmed.

LEFROY, C. J.

In this case I think the conviction is bad, on account of evidence which ought to have been rejected. It would, in my opinion, be making a new and dangerous precedent if we were to hold that this evidence was properly received; and the last case cited by my Brother who has preceded me, shows this to be so. Let us see what was the state of the parties at the time when this evidence was admitted. The confession of the prisoner was quite sufficient for the ends of justice; but that voluntary acknowledgment of his participation in the crime is departed from, and there is then brought forward a deposition taken before a Magistrate, under circumstances which have been so accurately and so often detailed that it would be mere waste of time to repeat them. On what ground, then, did the prisoner stand? By his arrangement with the chief constable that he was to go before a Magistrate and repeat the evidence which he had given to the constable; that he was to give that evidence confirmed by an oath, and under all circumstances likely to inspire confidence in the value of the information he was about to give, and which, therefore, it was important for the Crown to secure; clearly upon the ground on which every approver comes forward—upon the understanding that he shall have the protection of an approver, as the Crown has the benefit of the information he gives as an approver; information not allowed to rest upon mere statement, but confirmed for the benefit of the Crown by oath. If, then, he was taken by the Crown as an approver, is he, when the Crown had had the benefit of that arrangement, to be deprived of the protection of that arrangement? If he is to be taken on behalf of the Crown to give his evidence to

the utmost extent, and to verify it upon oath, to submit himself to cross-examination by the Magistrate, waiving any right to object to answer questions, are we, sitting here as a tribunal between the Crown and the subject, to say that the Crown is to be at liberty to have evidence given by him upon the understanding that he is to have protection, and that then the understanding is to be violated under the sanction of this Court? Upon what ground, when we consider the consequences to the party, and the privileges he secures by thus putting himself into the hands of the Crown, can we adopt such a principle? What is the duty of a Magistrate when a witness is before him, not as an approver, and what is the right of the witness? The duty of the Magistrate is, not to put questions that would criminate the witness. The right of the witness is, to be protected from answering such questions. But here most of the information arose from questions put by the Magistrate to the witness. If a witness is to be dealt with in this way, if he is to put himself in the position of one who, if he has sworn falsely, is liable to be indicted for perjury, and the Crown is then to turn round and say, we dealt with you as an approver, but you shall not have the advantage of an approver, though deprived of your privilege not to answer anything likely to prejudice yourself,—it seems to me that if the prisoner is to be thus dealt with, it would, in the language of *Hawkins*, “be making him the deluded instrument of his own conviction;” and that we should be doing so here if we were to confirm this conviction. I trust, therefore, we shall never authorise such a charge to be made against the tribunal which administers the duties that devolve upon us.

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Queen's Bench

THE QUEEN, at the prosecution of LEOPOLD CUST,

v.

THE JUSTICES OF THE COUNTY OF TIPPERARY.

April 19.

T. T. 1865.

June 12.

(Queen's Bench.)

The Summary Jurisdiction Act forbids the erection of any house, or part of a house, within thirty feet of the centre of any public road, with certain exceptions. It also enables the county surveyor, on giving ten days' notice, to summon the offending party before the Petty Sessions.

A. had an old wall, erected before the passing of the Act, within thirty feet of the centre of a public road; he subsequently raised it, and made it part of a cow-shed. Some correspondence passed between the county surveyor and A. No formal notice was given: and he was summoned and fined; the summons not negating the exceptions.

Held, that notice was only required where the county surveyor sought to do the necessary work at the cost of the offending party.

Held also, that, though the summons was defective, the Court, in the exercise of its discretion, would not grant a writ of *certiorari*.

A conditional order had been obtained, at the application of the prosecutor, for a *certiorari* to bring up a certain conviction or order of the Justices of the county of Tipperary, dated the 23rd of June 1864, against L. Cust, Esq. The conviction was had under the fourth section of the Summary Jurisdiction Act.* The summons of the Justices, on which the conviction had been obtained, was as follows:—

“J. L. WORRELL, County Surveyor, Complainant;

L. CUST, Esq., Defendant.”

“Petty Sessions District of Tipperary, county of Tipperary—

“Whereas a complaint has been made to me, that you, the said defendant, did, in the month of March 1864, build and cause

before the passing of the Act, within thirty feet of the centre of a public road; he subsequently raised it, and made it part of a cow-shed. Some correspondence passed between the county surveyor and A. No formal notice was given: and he was summoned and fined; the summons not negating the exceptions.

Held, that notice was only required where the county surveyor sought to do the necessary work at the cost of the offending party.

Held also, that, though the summons was defective, the Court, in the exercise of its discretion, would not grant a writ of *certiorari*.

* The Summary Jurisdiction Act (14 & 15 Vic., c. 92, s. 9), provides for injuries to public roads, and enacts, “That any person who shall commit any of the next following offences, in or relating to any public road, shall be liable to the punishment hereinafter specified in such case.” It then provides, in eight paragraphs, for the punishment of eight different offences. The second paragraph is as follows:—“No. 2. Any person who shall build, or cause to be built, any house, or part of a house, within thirty feet of the centre of any public road, except in the streets of corporate or market towns, or where a house now stands, shall be liable to a fine not exceeding ten pounds, and to a further sum of ten shillings a-week from the time of his conviction until the same shall be pulled down or removed.” After enumerating the other offences provided against, the section proceeds:—“And if the county surveyor, or the contractor for the repairing of any public road in any county, shall think that such road is prejudiced by any

"to be built a house, within fifteen feet of the fence, and less
 "than thirty feet of the centre of the public road, leading," &c.,
 "this is to command you to appear as a defendant on the hearing
 "of said complaint, at the Sessions-house, Tipperary, at twelve
 "o'clock in the forenoon," &c. The Justices' certificate stated "that
 "on the hearing of the said complaint, an order was made against
 "the said L. Cust, to the following effect, 'that he do pay a fine of
 "'one shilling sterling, and twelve and sixpence for costs, and be
 "'directed to remove the house.'"
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The affidavit of L. Cust stated that he had certain out-offices

such neglects or offences as aforesaid, or by the shade of any hedges or trees, except those planted for ornament or shelter of any dwelling-house, court-yard, or garden) or that any obstruction is caused in any public road by any hedge or tree, it shall be lawful for such surveyor or contractor, by notice in writing, to require the person who shall be guilty of any such neglect or offence, or the owner of the land on which such hedges or trees are growing, as the case may be, to fill up any ditch or drain which shall have been so scoured, deepened, or widened, or to scour any drains which have been so filled on the side of any public road, without the consent of the said county surveyor, or the authority of a presentment; or to scour or deepen any drain or ditch leading from any road which shall be omitted to be scoured or deepened, after due notice by such surveyor or contractor; or to remove any way or passage from any road into any adjoining land, or to any house, which may obstruct the free passage of the water, or to remake the same, by building a gutter, sewer, or arch therein; or to pull down any wall, or fill up any ditch or drain, the building of which shall have been an offence against the provisions of this Act; or to cut or plash such hedges, or to prune or lop such trees, so as that such road may not be prejudiced or obstructed by the same. And if such person or owner shall not comply with such request within ten days after such notice, it shall be lawful for such surveyor or contractor as aforesaid to summon such person or owner before the Justices assembled at any Petty Sessions of such county, to show cause why he has not complied with such request; and upon the hearing of such case it shall be lawful for such Justices, if they shall see fit, to order that such person or owner shall act as required by such notice as aforesaid; and if the said person or owner shall not obey such order within ten days after the making of the same, it shall be lawful for such surveyor or contractor, if so directed by the Justices, to do all or any of the said acts so required by such notice for the benefit or improvement of such road, or to remove such obstruction as aforesaid, to the best of his skill and judgment, and at the expense of such person or owner; and it shall be lawful for such Justices, upon complaint of such surveyor or contractor as aforesaid, and upon proof of the expenses incurred, to issue their warrant for the levy of such expenses by distress and sale of the goods and chattels of such person or owner: provided always that no person shall be compelled, nor any such surveyor or contractor as aforesaid be permitted to cut or prune any hedge, at any other time than between the last day of September and the last day of March."

E. T. 1865. built on the lands of Coolnahara, and that a slated cow-shed or
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 THE QUEEN a linney was built thereon, the gable-end of which was rested upon
 v. a wall which was rebuilt upon the foundation of a wall which
 JUSTICES OF existed at the time of the passing of the 14 & 15 *Vic.*, c. 92.
 TIPPERARY. That no notice was served upon deponent, such as required
 by the statute, previous to the issuing of the summons. The
 affidavit of J. L. Worrall, filed as cause, stated that the depo-
 nent submitted the correspondence which took place between
 deponent and L. Cust was sufficient notice of the purpose of pre-
 venting the infringement of the statute, to which correspondence he
 referred. That no house existed in that spot prior or subsequent to
 the passing of the Act. That evidence was given before the said
 Justices that said house was on a public road, and not in the streets
 of a corporate or market town, or where a house stood at the passing
 of the statute.

Ryan now moved to make absolute the conditional order, not-
 withstanding the cause shown.

The conviction is under the 14 & 15 *Vic.*, c. 92, s. 9, para-
 graph 3, and is clearly bad for not negating the exceptions in the
 statute. That paragraph enacts "Any person who shall build, or
 "cause to be built, any house, or part of a house, within thirty feet
 "of the centre of any public road, except in the streets of corporate
 "or market towns, or where a house now stands, shall be liable to a
 "fine," &c. The section further enacts that the county surveyor
 shall give the offending party notice to remove the obstruction, and
 if not removed within ten days, then shall summon him before the
 Justices. No notice was given in this case. Though the order
 being bad on the face of it, we would be entitled, according to
 the practice of this Court, to the writ of *certiorari*, yet, as it is
 a writ in the discretion of this Court, it is as well to show that sub-
 stantial justice will be done by granting it in this case. No change
 was made as to the position of the wall. Only about two feet of
 the roof of the shed extends over the old wall.—[HAYES, J. At
 the time of passing the Act, was it an old wall that was on this
 site, or substantially a house?—It was a house—[FITZGERALD, J.

Is there any interpretation clause showing that a cow-shed is a house?—That will be for the other side to show. The correspondence does not supply the place of the statutory notice.—
 [HAYES, J. Is notice necessary where the complainant seeks to have a fine imposed? It would be necessary if he sought to obtain the expenses of removing the obstruction himself.]—The Justices have ordered the wall to be pulled down here. *The Queen v. Justices of Wexford*, in this Court some years since, decided that the exceptions must be negatived in a conviction; so *Fitzpatrick v. Pine (a)*. In that case it was contended that the order was not a conviction.—[HAYES, J. Supposing we held that “house,” in paragraph 2, means a dwelling-house, would an owner have a right to throw it down, and put up a linney instead of it?]

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E. Johnstone, in support of the cause shown.

The Court cannot go behind the conviction now, but must assume that the conviction was on good grounds.—[O'BRIEN, J. Assuming that Mr. *Ryan* is right that the conviction is bad, he may show that this is a fit case to exercise our discretion.]—There are two questions, whether notice was given; and whether the conduct of Mr. Cust does not preclude his raising that objection?—[FITZGERALD, J. The county surveyor may pull down the wall, on notice, and then go before the Justices for costs. O'BRIEN, J. I think that is the meaning of the section. FITZGERALD, J. Two questions of law arise—first, is a cow-shed a house, or not; and must all the exceptions be negatived? LEFROY, C. J. If it be true that the wall is the same distance from the centre of the road as formerly, how can this building be an encroachment on the road? The object of the section is to keep the passage free; if it hung over, so as to be in danger of falling, it would be another thing.]—*Fitzpatrick v. Pine* was under the Grand Jury Act; but in this Act there is a clause of a peculiar kind, section 24, that no order made under the provisions of this Act, &c., shall be quashed for want of form.—[LEFROY, C. J. If there is jurisdiction; but, I think, none appears here. HAYES, J. There is this important

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 TIPPERARY. question, whether, a man having an ancient house, he may pull it down and put anything he likes in its place? It seems to me it would be a violation of the Act to take down the house and then construct another. FITZGERALD, J. Was the case against the *Justices of Wexford* under the Grand Jury Act?—Yes. In the Grand Jury Act there is no clause like this about defect of form.—[FITZGERALD, J. But this is substance.]

Ryan, in reply, on the point about negating exceptions, referred to *Crepps v. Durdan*, 1 *Smith's Leading Cases*, p. 649, and the cases there collected.

Cur. adv. vult.

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 June 12.

We are all of opinion in this case that the conditional order should be discharged. There seems to have been a contrivance to violate the Act of Parliament. The statute was intended to prevent walls being erected within a certain distance of the centre of the road; but there was an exception in favour of houses which were built at the passing of the Act. Here, though the wall was built before the Act was passed, yet it was subsequent to the passing of the Act that the wall was raised so as to make it a portion of a house.

We are, therefore, clear that the conditional order should be discharged; but as this Act contained an exception in the case of a house, that exception should have been negated in the conviction, and, from this informality in the proceedings, we discharge the order without costs.

O'BRIEN, HAYES, and FITZGERALD, JJ., concurred.

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CROFTON M. VANDELEUR, *Appellant*;
 WILLIAM MALCOLMSON and Another, *Respondents*.*

Jan. 28, 31.

THIS was an appeal from a decision of the Special Commissioners for Irish Fisheries.

Fishery Appeal.

The special case stated, pursuant to the 14th section of the 26 & 27 Vic., c. 114, contained the following facts material to the question before the Court:—That the appellant was seized in fee in possession of a considerable portion of the land adjoining the shore of the sea or estuary of the river Shannon, whereon the net in question was erected, and was so seized before the erection of the said net. That said net had been erected in or about the year 1815, by a tenant of the said appellant's family, who had fished same at a yearly rent to said appellant's family; and said net had been erected always in or nearly in the same site. That about eighteen years ago said weir had been surrendered to the appellant, and had been let some years ago by said appellant to Marcus Sheehy, as a tenant from year to year, by a parol demise, at a yearly rent of £4; and that the said Marcus Sheehy held the said weir as a yearly tenant under said appellant. The appellant had frequently supplied wood for the repairs of said weir; and said Marcus Sheehy paid rates and taxes for same, and took out a regular fishing license in respect thereof in each year. That the net had been erected and fished for salmon in 1862, and previously by said Marcus Sheehy as such yearly tenant, and was a salmon net or weir; and any net or weir that had been erected or fished in or about the same site was also a salmon net or weir; and that the said appellant was the owner in fee and occupier of the land adjoining the shore whereon the said fixed net was erected. That the net projected into the river Shannon, where the same is public, tidal, and navigable, and was erected upon the shore of the lands of Mount Shannon, within the limits between high and low water

A, owner in fee of the shore adjoining the river S., let to B, by yearly tenancy, a fixed net, erected in 1815, and continued down to present time in the same site.

Held, reversing the decision of the Commissioners of Fisheries, that the letting to, and user by B, did not render the net illegal under the 5 & 6 Vic., c. 106, s. 19.

* Before LEFROY, C. J., O'BRIEN, HAYES, and FITZGERALD, JJ.
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mark, whereof the appellant was and is seized as aforesaid. That it was admitted that Marcus Sheehy, who was the person actually fishing and using the said net in the year 1862 and previously, did not hold or occupy any land adjoining the shore of the estuary whereon said net was and is erected. That the appellant did not seek to make title to said net, under the 5 & 6 Vic., c. 106, s. 18, the appellant not laying claim to any several fishery along the shore whereon said net was erected. That the said net was held illegal, on the following grounds:—First, that the net was not legally erected during the open season of 1862, or at all in that year, or subsequently under 5 & 6 Vic., c. 106, s. 19;* for that said Marcus Sheehy was the person who fixed, erected, maintained, and used the said fixed net, within the meaning of the said 19th section, as explained by the 8 & 9 Vic., c. 108, s. 5, and the 13 & 14 Vic., c. 88, s. 16; and the said Marcus Sheehy did not hold or occupy any of the adjoining land. Secondly, that though said appellant was seized for an estate in fee in possession, and was in actual occupation of the adjoining shore, he was not, in contemplation of the statutes, the person who fixed, erected, &c.; whereupon the said Commissioners decided that said net should be removed.

* The 5 & 6 Vic., c. 106, s. 19, enacts:—"That it shall and may be lawful for every person who shall hold and occupy as tenant in fee-simple, or in fee-tail, or as tenant for life, or as tenant under any lease for a life or lives, or as tenant for a term of years, of which not less than fourteen years shall be unexpired at the time of first erecting such net, any land adjoining the sea-shore, or any estuary, not being within the limits of any such several fishery, but subject to the provisions of this Act, and to such regulations and restrictions as may be made by the said Commissioners as aforesaid, to fix or erect such stake net or other fixed nets as aforesaid, attached to that part of the shore adjoining such land: provided always, that no tenant under any lease for a life or lives determinable, or for years, of which less than one hundred shall be unexpired, shall be empowered to fix or erect such stake nets or other fixed nets as aforesaid, without the previous consent in writing of the chief landlord or lessor seized of any rent and reversion in such land; and provided also that the placing or erection of such stake nets or other fixed nets as aforesaid shall not give or confer any right or title to the occupancy of the said shore (except for the purpose of attaching the said fixed nets thereto during such occupancy of the land as aforesaid); saving to the Queen's Most Excellent Majesty, and all the subjects of this realm, the free and full exercise and enjoyment of all other rights of fishing, or other rights whatsoever, in or along the said sea-shore or coast, or the shore of such estuary as aforesaid, subject to the provisions herein contained."

Bzham, with him *Tandy*, for the appellant.

There was no allegation that the weir was injurious to navigation. Colonel Vandeleur is still the owner, and the use of the stake net only an easement by Sheehy. It was an incorporeal right only. The respondent maintains that an incorporeal right can be granted by parol under the new Landlord and Tenant Act 1860. All these nets, which are called indifferently stake nets, weirs, fixed nets, were legal until the Act of 1842. All through the Acts, fixed nets mean not only stake nets, but every stationary engine for the purpose of catching salmon. Section 18 of 5 & 6 *Vic.*, c. 106, regulates the rights of the owners of several fisheries in regard of stake nets; but under this section Colonel Vandeleur claims nothing. It is under section 19 that his claim arises. The second proviso of this section is as follows:—"Provided also, that "the placing or erection of such stake nets, or other fixed nets "as aforesaid, shall not give or confer any right or title to the "occupancy of the said shore except for the purpose of attaching "the said fixed nets thereto during such occupancy of the lands as "aforesaid." This guards against conferring any right to the sea-shore. In granting the right to erect legal nets on the shore, which belongs properly to the Queen, it became necessary to guard against the supposition that this conferred any right to the shore itself; so that when an incorporeal right was thereby created, and so given as an easement, the title to it was unconnected with the right to the land. This grant was of the same character as a grant by deed, only for this clause excepting right to the soil itself. This right is just like that discussed in *Drewell v. Towler* (a). There the right claimed was to fasten holdfasts in a wall to erect clothes lines thereon. Just like the case of an owner of a several fishery provided for by the 18th section. This right is to an incorporeal hereditament, and so lying in grant, it can only be conferred by deed, and it cannot be the subject of a parol demise. Therefore, we contend that this fishing was by Colonel Vandeleur's servants. In *Hall's Rights of the Crown on the Sea-shore*, p. 50, after stating that fishing may be of two kinds—with nets or other movable

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apparatus, or by means of weirs and fixed inclosures, he goes on:—
 “Now, the public cannot claim the soil under the sea or of the
 “shore itself; the public fishing of the subject is a floating liberty
 “of fishing with nets, hooks, &c., whereas the several or private
 “fishery may be claimed either as an individual personal right
 “of fishing with nets *in loco*, the soil or shore whereof belongs
 “to the King or to any private subject, or it may be claimed as
 “appendant or appurtenant to the ownership of an adjoining manor or
 “freehold.” *Duke of Somerset v. Fogwell* (a), *Holferd v. Bailey* (b),
 where a statement that ownership of the soil was in a third party
 was held not to vitiate the right to the fishery. The case of
The King v. The Inhabitants of Chipping-Norton (c) proves that if
 there be no deed to grant incorporeal right, it is a mere license. Lord
 Ellenborough there says:—“It was a mere license to collect the
 tolls, the right to which still remained in the corporation.” The
 case of *Wood v. Leadbitter* (d) is to the same purpose; the
 marginal note there states:—“Right to enter and remain for
 “certain time on the land of another can be granted only by deed;
 “and parol license to do so, though money be paid for it, is re-
 “vocable at any time.” They say, admitting your argument, that
 this is an incorporeal hereditament; yet, by Landlord and Tenant
 Act, an incorporeal hereditament from year to year may be granted
 by simple writing, and under a year by parol.

They contend that, under the 3rd and 4th sections of the 23 & 24
Vic., c. 154, rent must make Sheehy a tenant. They must contend
 that this fourth section is an implied repeal of the Common Law,
 and also of the second section of the Statute of Frauds. The title
 of the Act is, “To Consolidate the Law of Landlord and Tenant;”
 and surely there was no intention to change the settled law of
 the land. Then, is this Act retrospective? The words of section
 three are, “The relation of landlord and tenant *shall* be deemed to
 “be founded on the express or implied contract of the parties, and
 “not upon tenure or service; and a reversion shall not be neces-
 “sary to such relation, which shall be deemed to subsist in all cases

(a) 5 B. & C. 875.

(b) 13 Q. B. 426.

(c) 5 East. 239.

(d) 13 M. & W. 838.

"in which there shall be an agreement by one party to hold land "from or under another in consideration of any rent." None can contend that any agreement to hold land existed here in the meaning of the section. The fourth section does not purport to deal with a tenancy from year to year; it expressly excludes such tenancy, which would be legal without any writing under the provisions of this Act, if this Act repealed the second section of the Statute of Frauds. It is said in *Bailey v. Cunningham* (a), that the relation of landlord and tenant may be created by parol demise for three years. There it was decided that parol demise of right to fishing was good. Then the 104th section declares, "From and after the commencement of this Act, the Acts and parts of Acts "in Schedule (B) to this Act annexed," &c., "shall be and are "hereby repealed;" so this section takes away repeal by implication, and shows further that it could not affect rights previously acquired. When the language of the statute is not clear, we cannot adopt a construction destructive of rights existing. To this effect is the *dictum* of Justice Perrin in *Farran v. Ottiwell* (b), mentioned in *Ellis v. O'Neil* (c), in the judgment of the LORD CHIEF JUSTICE.

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That is the rule in construing a statute interfering with Common Law right. Now, these are statutes interfering with Common Law right in this case: *Buzzard v. Capel* (d) and *Swatman v. Ambler* (e). Rent commonly issues out of a corporeal hereditament. Now, this third section says this relation shall arise where there is any agreement "in consideration of rent." Then they have recourse to the interpretation clause, where rent may mean any "sum or "return in the nature of rent, payable or given by way of compensation for the occupation of land." But there is no authority for having recourse to the interpretation clause to eke out a meaning injurious to existing rights: *The Queen v. The Justices of Cambridge* (f). In *Cunningham v. Bailey* the judgment of Mr. Justice Christian is strongly in appellant's favour upon this point, as it

(a) 8 Ir. Jur. 213.

(b) 2 Jebb. & S. 97.

(c) 4 Ir. Com. Law. Rep. 467.

(d) 8 B. & C. 141.

(e) 8 Exch. 72.

(f) 7 Ad. & Ell. 480.

H. T. 1865. clearly shows that there is no repeal of the Common Law. In
Queen's Bench *M'Areavy v. Hannan* (a) the third section of this Act was held not
 VANDELEUR retrospective. Again, in the tenth section, which is intended to be
 v. retro-spective, it is clearly so expressed, "where any lease *has been*
 MALCOLMSON. "or shall be made, containing an agreement restraining or prohi-
 "biting assignment, the benefit of which *has not been* waived," &c.

Longfield, for the Commissioners for Irish Fisheries.

If these nets were erected under the new Act, the 19th section is the only one necessary to consider. The 18th section does not apply, as Colonel Vandeleur does not claim a several fishery. The words of this section contain an express proviso against the appellant's claim. This is a corporeal, not an incorporeal hereditament. It is provided by the Act of 1842 that these weirs shall not be a nuisance to navigation. See fifth section of 8 & 9 Vic., c. 108. There is no resemblance between this case and that of *The Duke of Somerset v. Fogwell*. Now it is expressly found here that the weir was let as a yearly tenement. Sheehy took out the license, and paid rent and taxes for the weir. In *Malcolmson v. O'Dea* occur the words of my LORD CHIEF JUSTICE:—"A fishery in concomitance with the soil." It is said this weir is part of the soil. In the same case Baron Fitzgerald says:—"He could not let the right to erect a weir."—[HAYES, J. If, after he erected the weir, the tide were some night to carry it away, would the right be gone?—FITZGERALD, J. Assuming that Colonel Vandeleur had a right to erect it, if he allows another person to use it, would it be a violation of the law? And, assuming it to be an incorporeal hereditament, show me that the right would be gone.]—If the owner in fee were to erect a net, and then cease to occupy, his right goes.—[HAYES, J. If the license was paid for by Colonel Vandeleur, it might be used by any one.]—This was a good parol demise at Common Law. *Bailey v. Cunningham* is an express decision that demise by parol is good under the Landlord and Tenant Act 1860. The fourth section implies that all estates not specially provided for may be created by parol.

(a) 13 Ir. Com. Law Rep. 70.

Shaw (with him *E. Johnston*) for respondent Malcolmson.

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All these Acts should be construed together, as forming a code of law. There is no intention to abridge in the weir-owner any lawful right. This 19th section only abridges a right of the public. In *Templemore v. Allen* (a), it is laid down that the rights of weir-owners were to be tried strictly as being against public right. There, there was no consent of the landlord. Section 10 says:—"It shall be lawful for," &c., "but subject to the provisions of this Act." Now Sheehy cannot bring himself within the provisions of this Act. The object of this Act was to prevent strangers from erecting weirs, as the Scotchmen had done. The owner of a several fishery may do this by the 18th section. This 19th section says that, "Where no several fishery exists, it shall be lawful," &c. If there is a lease for fourteen years, then the tenant can erect the weir, with the landlord's permission; but, if the land is in possession of a yearly tenant, the landlord must either give a greater interest to the yearly tenant, or must turn the tenant out, and take the land into his own hands. The fifth section of the 8 & 9 Vic., c. 108, after referring to this Act as one that defines who may use those nets, goes on:—"If any person, other than those "so entitled to exercise such right as aforesaid, shall erect, use, "or fish with any stake, weir," &c.; showing that the Act contemplated the erection and use by the same person. If summons had issued against Sheehy before the Magistrates, he would have been liable to a penalty of £10.—[LEFROY, C. J. Then, if any friends were permitted to fish by Colonel Vandeleur, he would be liable to £10 penalty.]—The question of agency would then arise, whether he would not be considered as fishing himself.—[O'BRIEN, J. In strict construction, weirs legal before the Act are now made illegal; but, once weirs are erected, then a liberal construction should be adopted.]—This Act is much the same as if it said, "If any one who is not the owner of adjoining land, or who has "not erected it himself, shall," &c., he shall incur a penalty of £10. The words "erecting, using," &c., in this section, support this view. Secondly; this weir is not an incorporeal hereditament,

(a) 8 Ir. Law Rep. 199.

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but a chattel. A weir consists only of poles and a net, from the time the net is first erected in the early spring time, and so remains till the end of the season: *quiquid plantatur solo, solo cedit*.

There was an easement existing to put a weir in that place; but, as soon as the weir was erected, then it was no longer an easement. *Sir J. Davies*, p. 154, sec. 3:—"The city of London, by charter "from the King, hath the river Thames granted to them; but "because it was conceived that the soil and ground of the river "did not pass by that grant, they purchased another charter, "by which the King granted them *solum* and *fundum* of the said "river; by power of which grant the city to this day receives rents "of those who fix posts, or make wharfs or other edifices on the soil "of the said river:" *Wood v. Hewitt* (a). The owner of the weir would have, under this Act, so much soil of the ground as is necessary for his weir.—[O'BRIEN, J. Take the case of *Drewell v. Towler*, about a staple in a wall: whilst it remains in the wall it keeps the right in abeyance, but it belongs to the person who places it there.]—*Lancaster v. Eve* (b); *Harvey v. Smith* (c).

Tandy, in reply.

We claim no right created by this section of the statute. The case of *Lancaster v. Eve* was decided upon statutory right. He cited, further, the judgment of Mr. Baron Parke, in *Cattley v. Arnold* (d); *The Duke of Devonshire v. Smith* (e).

Cur. adv. vult.

LEFROY, C. J.

Jan. 31.

In this case a great many questions of law have arisen, and have been fully discussed. We have considered all these points; and the decision arrived at unanimously is, that we ought to reverse the decision of the Commissioners. My Brother O'BRIEN will deliver the judgment of the Court.

(a) 8 Q. B. 913.

(b) 5 C. B., N. S. 717.

(c) 22 Beav. 299.

(d) 1 John. & Hem. 651.

(e) 2 Hud. & Br. 512.

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This case comes before the Court on an appeal from the decision of the Special Commissioners for Irish Fisheries, whereby they decided that a certain fixed net, to which the appellant was entitled, was, under section 19* of the Salmon Fishery (Ireland) Act, and the Salmon Fishery Acts, illegal and void, and should be abated and removed.

The case has been fully argued before us ; and we are all clearly of opinion, as it has been already stated by my LORD CHIEF JUSTICE, that the decision of the Commissioners was erroneous, and that the net was not illegal, on the grounds stated in the special case. The two grounds of objection appear substantially to involve the same question. The Counsel for the respondent, in support of the decision of the Commissioners, contended that, supposing that the net was legal originally, it continued legal so long only as the owner of the net and occupier of the adjacent land continued to be the same person ; that if, by the letting or disposal of the net in any other manner, the owner and occupier of the land ceased to be entitled to the use of the net, the net was illegal ; and, in order to bring the present case within that rule, the respondent's Counsel further contended that the letting of the net to Marcus Sheehy, made by the appellant, as stated in the case, connected with the subsequent payment of rent, amounted to such a severance of the net from the ownership and occupation of the land as, according to the principle of the rule, rendered the net illegal. To support that view, they sought to establish three propositions ; first, that the net, and the right of fishing therein, was in the nature of a corporeal, and not an incorporeal hereditament or right ; secondly, if that was so, that the parol demise of the net by the appellant to Sheehy, followed by the enjoyment of the right of fishing, and the payment of rent by him, created a tenancy from year to year in Sheehy ; and that, accordingly, Colonel Vandeleur ceased to be the person in actual possession and enjoyment of the right of fishing. It was further contended that, supposing the right of fishing in the net was to be considered not a corporeal, but an

* See section and case in the statement, *ante*, p. 570.

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incorporeal right or hereditament—a right to take a profit *a prendre* in the soil of another, by the third section of the Landlord and Tenant Act (23 & 24 *Vic.*, c. 154), the settled distinction which formerly prevailed between the effect of a parol demise of a corporeal, and a parol demise of an incorporeal hereditament, was put an end to; and that now in the latter case, as well as in the former, a tenancy from year to year may be created by a parol demise, followed by actual possession, enjoyment, and payment of rent; and therefore it was concluded that, whether the right in question was to be considered as in the nature of a corporeal, or in the nature of an incorporeal right or hereditament, in either case Sheehy was tenant of it from year to year.

Now, with regard to the general proposition contended for, that a valid alienation or disposition of the net or right of fishing alone would render the net illegal, it is not necessary, in the view which we take of this case, to decide. For myself, I may say that it appears to me that there would be great difficulty in establishing such a proposition. A great deal was said about the policy of the Fishery Acts. With regard to that argument, it appears to me that the policy of those Acts was to prevent the erection of illegal weirs or nets; but where the original erection of the weir was legal, I do not see any ground for saying that it was part of the policy of the Act to prevent the parties rightfully entitled to such weir or net from exercising over it the same right of disposition as they would have over their other property, and as they would have in regard to property of the same description, viz., a right of fishery, if they had acquired that right under other circumstances than under the 19th section of the 5 & 6 *Vic.*, c. 106. Speaking for myself, I think it would require very clear words in the Act of Parliament to give it that construction. I do not go through the various sections of the Act of Parliament relied on by Mr. *Longfield* and Mr. *Shaw* to establish that proposition, because it is not necessary for the Court to decide it; I merely observe that they contended for a proposition which it would be very difficult to establish. However, as I have said, it is not necessary to decide it; for, assuming the existence of such a rule, that a valid

alienation of a net or right of fishery acquired under the 19th section, for the entire interest, or for a lesser term, a lease for years, or a tenancy from year to year, would render the net illegal—we think, from the facts stated in this case, that the disposition of this net to Sheehy did not amount to a valid demise of it to him as a yearly tenant, but was a mere license to him to use the net for his own benefit—a license which was revocable at any time. Whether or not a Court of Equity would interfere to restrain Colonel Vandeleur from exercising that power of revocation, having regard to the valuable consideration which was given for it, at law it amounts to no more than a license.

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The first question which we have to consider is, whether this is a corporeal or an incorporeal hereditament? Great ingenuity was shown by the Counsel who argued in support of the decision of the Commissioners on this point. It was contended that the materials of the net were certainly of a substantial nature, and that, being fixed in the ground, they gave the net the character of a corporeal hereditament. With every respect for that ingenious argument, we think that it overlooks the manifest distinction between the right to fix a substance in the soil of another, and the right to the substance so fixed. We were referred to two or three cases on this point, which we think clearly establish that proposition. The case of *Drewell v. Towler* (a), cited by Mr. Tandy, illustrates a right of this sort. A person claimed a right to fix a holdfast in the wall of another, in order to hang linen thereon for the purpose of drying it. Although the holdfast was a substantial thing, it never occurred, either to the Counsel or the Court, nor was it argued or suggested, that the right was anything but an incorporeal right.

The case of *Lancaster v. Eve* (b), cited by Mr. Longfield, appears to me, when rightly considered, to lead exactly to the same conclusion. In that case the soil of the shore in which the pile was fixed was in the Corporation of London. In this case the soil where the net is fixed is the property of the Queen, as a matter of right. A pile had been driven into the bed of the river

(a) 3 B. & Ad. 735.

(b) 5 C. B., N. S. 717.

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Thames, upwards of twenty years before the action was brought, opposite the wharf of the plaintiff. He brought an action against the owner of a barge, for driving negligently his barge against the pile. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the pile; and, thirdly, that the pile was unlawfully driven into the soil and bed of the river Thames, the same being a public and common navigable river, and a common highway, &c., and that the pile was obstructing the passage of the river. It was contended for the defendant that the pile, having been driven into the soil of another, became attached to the freehold, and became the property of the owner of the freehold, and was therefore the property of the Corporation of London, and not of the plaintiff. Cockburn, C. J., says:—"I do not mean to controvert or question the general proposition, that whatever is annexed to the freehold becomes part of the freehold; but there may be circumstances to take a case out of the general rule—as, for instance, where the thing is so annexed as to be severable without injury to the soil, and where there may have been an agreement between the owner of the soil and the owner of the chattel that the chattel should be severable at the will and pleasure of the latter. I think there are circumstances here from which we may properly draw the inference that the pile in question was not placed in the bed of the river with a view to its permanent annexation to the freehold, so as to become part of the freehold; but that it was placed there by virtue of *an easement granted* by the Crown, or whoever had the right to grant it, to the occupiers of the adjoining wharf, for the more convenient use and enjoyment thereof. It seems to have been admitted at the trial that the plaintiffs, or their predecessors in the enjoyment of the wharf, had fixed the pile where it stood, and had had the use and benefit of it for a long series of years, without there ever having been any interruption, or any assertion of right to it by the Crown, or by the conservators of the river." Every word of that, which was applicable to that case where the soil was in the Corporation of London, and the pile was fixed in it for the convenience of the owner of the adjoining wharf, is equally applicable to the present case, where

the soil is in the Queen, and where the piles were inserted, not in consequence of a presumed agreement between the Crown and Colonel Vandeleur, but under the provisions of an Act of Parliament. Cockburn, C. J., continues:—"The fair inference therefore is, that the pile was driven into the bed of the river in the exercise and enjoyment of a right or easement, and that it never was intended that the Crown, or any other body or person, should acquire any right or property in it, but that it should continue the property of the occupiers of the wharf, with the right to remove it at their pleasure. I therefore think that the plaintiff's claim in this action is not impeded by the plea of not possessed." The rest of the Court concurred. I think, if there was any doubt in the matter, that is a satisfactory authority to show that the stakes, by being fastened to the soil, did not become the property of the Queen, and were removable at pleasure. What ground then is there for saying that Colonel Vandeleur acquired a property in the soil of the river where the stakes were embedded? Being the property of the Queen, it would not pass by implication; but we have the express words of the Act of Parliament, which exclude him; for the 19th section saves "to the Queen's Most Excellent Majesty, and all the subjects of this realm, the free and full exercise and enjoyment of all other rights of fishing, or other rights whatsoever, in or along the said sea-shore or coast, or the shore of such estuary as aforesaid, subject to the provisions herein contained."

Therefore, in dealing with the weir, Colonel Vandeleur could give no other right whatever except the right to attach the nets to the stakes. So long as he occupies the adjoining lands he has a right to attach the nets to the stakes; but he has no title to any portion of the soil. That is an incorporeal and not a territorial right, according to the doctrine of *The Duke of Somerset v. Fogwell* (a), recognised by *The Duke of Devonshire v. Smith* (b); and a term for years could not be granted out of it except by deed. Any parol demise of it is actually void, and does not prevent the person who made it from bringing an action of trespass. The same doctrine is laid

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(a) 5 B. & Cr. 875.

(b) 2 H. & Br. 512.

H. T. 1865. down by Willes, J., in *Malcolmson v. O'Dea* (a). It appears to me, on these grounds, that this is an incorporeal hereditament.

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The question remains as to the effect of the Landlord and Tenant Consolidation Act, 23 & 24 Vic., c. 154. We were referred to the case of *Bailey v. Marquis of Conyngham* (b), before the Court of Common Pleas. In that case the Marquis of Conyngham, by parol, agreed to let to the plaintiff a fishery for a year, after the passing of the Landlord and Tenant Act. The plaintiff brought an action against the Marquis for hindering and interrupting him from the enjoyment of it before the expiration of a year. The question was, whether the parol agreement for a lease was valid under the third section of the Landlord and Tenant Act. The Court was divided in opinion. The Lord Chief Justice and the late Mr. Justice Ball held that the case was within the provision of the third section of the Act, and that a tenancy from year to year might be created without the formality of writing, and, *a fortiori*, without a deed. Mr. Justice Christian differed from them. If it was necessary to decide that question, it is by no means clear that his view was not the sound one. But it is not necessary to decide the question in this case, because in this case the dealing between Colonel Vandeleur and Sheehy was antecedent to the passing of the Act, and, therefore, we are called on to give the Act of Parliament a retrospective operation; and for what purpose? If what I have stated be correct, at the time of the passing of the Act, Colonel Vandeleur was the owner of the net, he was the person actually and legally entitled to the ownership of it; Sheehy was a mere licensee. There was no relation of lessor and lessee between them. But if the Act were to be construed to be retrospective, it would have created an entirely new relation between Colonel Vandeleur and Sheehy, and would have rendered the net illegal and liable to be abated. It would require very clear words in the Act to induce the Court to give it such a construction. There are no such words in the Act. On the contrary, the word "shall" is used throughout the section, which seems to warrant the Court in holding, in accordance with justice and good sense, that it has

(a) 10 Jur., N. S. 1138.

(b) 8 Ir. Jur., N. S. 212.

a retrospective operation. The third section is in these words:—
 “The relation of landlord and tenant *shall* be deemed to be founded
 “on the express or implied contract of the parties, and not upon
 “tenure or service; and a reversion *shall not* be necessary to such
 “relation, which shall be deemed to subsist in all cases in which
 “there shall be an agreement by one party to hold land from or
 “under another in consideration of any rent.”

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Now, what is the state of things here? Sheehy held the weir for several years. A tenancy from year to year is generally created by agreement, followed by payment of rent and possession, or by possession and payment of rent, independently of actual agreement, when there are sufficient grounds for coming to the conclusion that there was an agreement for a yearly tenancy. In *Oxly v. James (a)*, Baron Parke defines a tenancy from year to year. He says:—“*Legg v. Sturdwick (b)*, and *Bac. Abr.*, tit. *Leases*, L, 3, “show what is the nature of an estate from year to year; namely, a “lease for a year certain, with a growing interest during every year “thereafter, springing out of the original contract, and parcel of it.” A tenancy from year to year once created cannot be determined except by notice to quit, or by a surrender in writing, or by a surrender by operation of law; and it is not necessary that there should be an agreement to continue the tenancy: it continues without any agreement, and cannot be put an end to by agreement merely. Therefore, the agreement in this case was antecedent to the Act.

On that ground we are relieved from the necessity of deciding between the conflicting opinions of the Judges of the Court of Common Pleas, because we are of opinion that the third section of the Landlord and Tenant Act is not retrospective, and does not apply to this case, in which the original agreement was antecedent to the Act; and that the parties to the original agreement, in contemplation of law, stood in the relation of licensor and licensee, and continued in that relation until the passing of the Act. To give that Act a retrospective effect would be to give it a construction contrary to the strict terms of it, which no Judge ought to do.

HAYES, J., concurred.

(a) 13 M. & W. 214.

(b) 2 Salk. 214.

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I wish to say that we do not express any opinion in this case on the effect of the third section of the Landlord and Tenant Act. We shall be prepared to express an opinion upon it when the question properly arises before us. But I may say, for myself, that I should be slow to hold that it had the effect of converting a revocable into an irrevocable license.

Order of Commissioners reversed.

THE QUEEN,

At the prosecution of JOHN LYTLE, Esq., Mayor of Belfast,

v.

JOHN REA.*

Jan. 23.

R. wrote a notice to L., Mayor of B., and certain members of the Town-council, saying that, in a certain event, he would use said letter to charge them with the felony of manslaughter; "and take further notice that, as regards those whom, with the Mayor, I intend to have returned for trial at the next Assizes, for the conspiracy alleged to have been carried out on the 13th of December last, I will, if they again conspire illegally to exclude the said burgesses, &c., use this notice to charge the said persons accused as conspirators, with the felony of murder." R., being convicted on a criminal information moved in arrest of judgment.

THIS was a motion in arrest of judgment. The criminal information in the case contained nineteen counts. The first count set out that the said John Lytle was Mayor of Belfast, and, whilst such Mayor, and in pursuance of the duties of his office, duly presided at two several meetings of the Town-council of Belfast. That a certain resolution was under discussion at the first of said meetings; and the said J. Rea addressed the meeting, and was told by the Mayor that, if he persisted in introducing irrelevant statements, he, the

Held, that this letter disclosed a good ground for a criminal information.

Held further (by LEFROY, C. J., and HAYES, J.), that slanderous words spoken of and to a Mayor, in the discharge of his office as Mayor, and of him in the execution of his office, the said Mayor being also a Magistrate in virtue of his office, are the subject of a criminal information.

Held (by O'BRIEN and FITZGERALD, JJ.), that such words are not the subject of an indictment, nor, consequently, of a criminal information.

* Before the Full Court.

Mayor, would put the question at once. That then the said H. T. 1865.
 J. Rea, while the said J. Lytle was duly, and in the execution ^{Queen's Bench}
 of his office, presiding over the said meeting, spoke, &c., to, of ^{THE QUEEN}
 and concerning the said John Lytle as such Mayor of Belfast, ^{v.}
 and to, of and concerning the said J. Lytle in the execution of ^{REA.}
 his said office of Mayor as aforesaid, and to, of, and concerning
 the said J. Lytle whilst he was presiding over the said meeting
 as aforesaid, amongst others, the several false, &c., to wit, "I
 "respectfully say that, until I am dragged out of this room by
 "your officers, at your individual peril, you will not put this
 "resolution until I have concluded my argument; and I insist
 "upon your hearing me explaining the law of conspiracy, and
 "proving that these tax-collectors are liable to conviction imme-
 "diately upon trial; and, furthermore, if you suppress this debate,
 "and don't hear what any Judge in the land will hear, I will,
 "beyond all question, put you in the indictment as a co-conspirator
 "with them." And, further, that said J. Lytle declaring that
 he was judge of order, then the said J. Rea spoke the further
 defamatory words:—"So long as you are acting *bona fide* in the
 "execution of your duty, I charge you with acting corruptly in
 "the execution of your duty; I charge you as co-conspirator with
 "said tax-collectors, and several others, in packing the burgess-
 "roll; and I say that you would never have been Town-councillor,
 "Alderman, or Mayor of Belfast, if the burgess-roll had not been
 "packed from year to year; I charge you with a breach of the
 "laws of the land; I charge you as a co-conspirator, with de-
 "grading your office." The count set out several repetitions of
 this statement. The next eleven counts were to the same effect,
 slightly varying the statement of facts. The next six charged
 the language as spoken with a view to instigate a breach of the
 peace. These latter were, however, abandoned. The nineteenth
 and twentieth counts stated that a certain meeting of the Council
 had been held with closed doors, pursuant to resolutions to that
 effect duly passed; and the said J. Rea published a false, &c.,
 libel, of and concerning the said J. Lytle, as Mayor, &c., to wit,
 "And take further notice, that, in the event of any of the mu-
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 "Belfast, being killed in any scuffle arising out of any attempt
 "to execute the illegal orders which were carried into effect on
 "the 13th of December, I will use this notice to charge such of
 "you as absent yourselves from your duty without reasonable or
 "sufficient cause, with the felony of manslaughter. And, take
 "further notice, that, as regards those whom, with the Mayor,
 "I mean to have returned for trial at the next Assizes, for the
 "conspiracy alleged to have been carried out on the 13th of
 "December last, I will, if they again conspire illegally to exclude
 "the burgesses and ratepayers from the Town Hall, use this notice
 "to charge the said persons accused as conspirators with the felony
 "of murder."

To the first thirteen the defendant pleaded in justification of the allegations, and also a further justification to eighteen, nineteen, and twenty.

The case was tried at the Summer Assizes for Antrim, 1863; and the jury found for the prosecution on all the issues.

The prisoner, now awaiting the sentence of the Court, moved in arrest of judgment.

Butt (with him Serjeant *Armstrong* and *J. M'Mahon*), for the prisoner.

The information consisted originally of nineteen counts, which might be divided into three classes. The first twelve charged the prisoner with using words of the prosecutor derogatory to him in his office of Mayor; but they contained no allegation of any intention to provoke a breach of the peace. The next four reiterated the first charge, adding the allegation of intention to provoke a breach of the peace. But on these four a *nolle prosequi* had been entered. Then come three counts for a totally distinct offence, a libel on the Mayor. There is no principle of law, nor any decided case, that words spoken of the president of a municipal body amount to a misdemeanour. These counts contain no allegation either, that Belfast is a municipal town. Although the Municipal Act mentions Belfast, still there is no averment that the

Municipal Act was put in force there; yet after verdict, I admit, I cannot take advantage of that. Then there is no allegation that the words the Mayor objected to were irrelevant, but merely that the Mayor considered them so. If we apply the test whether indictment lies or not, we know that no words spoken are indictable unless those calculated to provoke a breach of the peace, or treasonable words, or those spoken of a Magistrate in the discharge of his duty: 1 *Hawkins' Pleas of the Crown*, p. 63, c. 6, ss. 11. In all the text-books this offence of words spoken contemptuously of a Mayor are all classed under offences against the King, or against the administration of justice. There is no allegation of intention to bring the administration of justice into contempt. If no indictment lies, then no criminal information can be supported.—[LEFRAY, C. J. Is not the object of a criminal information to punish offences not within the ordinary scope of the law?—Yes, to enable the Crown to take a satisfactory remedy where the machinery of the law is defective; but it cannot create an offence. He who speaks against a Judge in the administration of justice, may be fined, “or, as some say, may be indicted.”—1 *Hawkins' Pleas of the Crown*, p. 63. There is no precedent for indictment for words spoken against a Mayor, although he be a Justice of the Peace. If slanderous words be spoken of a Superior Court, as this is, it would be an indictable offence, but not of an inferior Magistrate. At present, let us deal with these merely as slanderous words: *The Duke of Marlborough's case* (a). Words not tending to provoke a breach of the peace were never made the subject of indictment. Nor is the office of a Mayor like to that of a Justice; for the essential ingredient in the offence against a Justice of the Peace was, that the act was an obstacle to the administration of justice. By the Municipal Act, any other member of the Town-council may, in the absence of the Mayor, preside over the meetings of the Council; but he would not be a Justice of the Peace at all. If you establish this privilege, it could not be limited to Mayors; it must extend also to the chairman of a railway company, who is the person appointed by statute to preside at a meeting of the shareholders, and to the chairman of a

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(a) 5 Q. B. 955.

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poor-law board. As to the seventeenth, eighteenth, and nineteenth counts, that charged libel on the Mayor in the execution of his office, the prisoner sets out the acts he charges the Mayor with, which are not denied, and says that they make him a conspirator. If he had said he was a conspirator, without stating the facts, it would be a libel; but, having given the facts for all the world to judge, he judges them himself, and states his inference of law from these facts.—[FITZGERALD, J. Does he charge the proceedings of the past as a conspiracy?—No; as leading to a conspiracy. He only states, “you have done a certain act; and my opinion is, that you are thereby subject to an indictment.” Suppose the case of any one publishing an opinion laid before Counsel, as to stopping up a highway, could such publication be held a libel? Unless itself a libel, no mere expression of opinion that the act is indictable is libellous.—[O'BRIEN, J. Do you say that the act charged was illegal?—Yes; they are not entitled to take it otherwise. The meaning of “conspiracy” is not to be pressed as necessarily illegal; it only means agreement between two or three persons to do any act. This was merely an expression of opinion on a matter of public interest: *Campbell v. Spottiswoode* (a); *Turnbull v. Bird* (b); *Paris v. Levy* (c); *Lewis v. Levy* (d).

Brewster (with him *Joy*, *Harrison*, and *Bruce*), for the relator.

The words of the prisoner were, “I charge you with acting “corruptly in the execution of your duty—packing the burgess-“roll.” There is no distinction, except one, between words addressed to a Mayor in the execution of his duty, and to a Justice of the Peace: that one is, that words spoken to a Justice were held a reproach to the Government for his appointment. But words that would warrant a Justice of the Peace to commit for contempt, would warrant an indictment. The power to commit for contempt is convertible with the power to indict: *King v. Burford* (e), where

(a) 9 Jur., N. S. 1069.

(b) 2 F. & F. 508.

(c) 2 F. & F. 71.

(d) 27 Law Jour., Q. B. 282.

(e) 2 Keble, 494; S. C., 1 Vent. 16.

it was held that words of this kind warranted Justices to bind over to keep the peace. In *The Queen v. Langley (a)*, slanderous words spoken of a Mayor were held not indictable, but there they were not spoken to the Mayor in the execution of his office. *The Queen v. Wrightson (b)*; *The King v. Cranfield (c)*. In all the cases of Mayors, those of Magistrates are cited, and *vice versa*. *The King v. Soley*, referred to by Lord Holt, in *King v. Wrightson*. *The King v. Pocock (d)*; where it is said, if the words charged were spoken to a Mayor in the execution of his duty, it would make the matter indictable. *Onslow v. Horne (e)*, where two rules are laid down by Lord Chief Justice De Grey. *The King v. Symonds (f)*, there the indictment was for striking the Mayor in the execution of his office, and the Court treated it in the same way as in the case of a Magistrate. In *Simmons v. Sweete (g)*, it was considered that the Magistrate might have imprisoned if the words were spoken in "the public place of justice." *The King v. Darby (h)*; *Ashton v. Blagrave (i)*; *The King v. Revel (k)*. The argument is that, though he might have been committed, he was not indictable. By admitting one, you admit the other.—[FITZGERALD, J. Has it ever been decided that a Mayor could commit when not in a Court of Justice?—The cases of Presidents of Corporations are quite different now and formerly; for all such were not formerly Justices. By the eighty-fourth section of the Municipal Act the Mayor is made a Justice

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Pleas of incorporation to thirteen first counts are incorporated by pleading with those to the libel counts. No grave doubt was ever raised that a Mayor could commit. *Sir F. Moore's Reports*, p. 247; *Anonymous case*; there the words were "fool of a Magistrate;" and it is said that if spoken in the place of his office, he might commit:

(a) 2 Salk. 697; 6 Mod. 105.

(b) 2 Salk. 697.

(c) 5 Mod. 203; S. C., 12 Mod. 98.

(d) 2 Strange, 1157.

(e) 3 Wilson, 177.

(f) Cas. temp. Hardwicke, 277.

(g) Cro. Eliz. 78.

(h) 3 Mod. 139.

(i) 8 Mod. 270; S. C., 2 Str. 76.

(k) 1 Strange, 420.

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When you say that he might commit him, you admit that indictment lies. The cases cited by Mr. *Butt* are charges to jury, and a reasonable statement of the law before verdict. As to the libel counts, the jury have found that Rea falsely charged the Mayor with illegal conspiracy. All the argument of Mr. *Butt* leaves out the illegal act, which is the essential element of a conspiracy—[FITZGERALD, J. Is there anything in the later counts to show that it was illegal to exclude people? Suppose the charge were that the Mayor conspired by legal means to do an illegal act, would action lie?—The charge is that the Mayor did it by illegal means.

Armstrong, in reply.

In *The Queen v. Revel* it was said the Justice might commit; but that was not proof that an indictment would lie. The power to commit is not the same as the power to indict: for instance, a witness may be committed for refusing to answer; could he be indicted? There is no decision that a Mayor can commit for words spoken while he is not performing the duties of a Magistrate. Why should not the chairman of the directors of the Bank of England have the same power? In *The Queen v. Langley* (b) the Mayor was a Magistrate; and it is said no precedent can be found to imprison for words spoken of a Magistrate out of Court. If Mr. Lytle was sitting in Petty Sessions he could commit. The words in that case, "disparagement of the Government," &c., must mean that he was a Magistrate. *The King v. Cranfield* (c) is no decision in favour of Mr. *Brewster*. In *King v. Symonds* they say a Magistrate is protected in the execution of his office; they must mean that the Mayor there was a Magistrate. In *Simmons v. Sweete* it was held that the Mayor might not imprison, but might bind over to keep the peace. If he had been in the place of justice, then he might have committed him.—[O'BRIEN, J. It appears, I think, from the report in *Moore*, that the Mayor there was also a Magistrate.]—As chairman of a public meeting he might

(a) 2 Buls. 139.

(b) 2 Salk. 697.

(c) 5 Mod. 203.

have had a right to exclude a person obstructing him in the discharge of his duty; but that is different from an indictment; or he might have taken his action for damages.—[O'BRIEN, J. The case in *Moore* is probably the same as that of *Simmons v. Sweete*.]—Also the case of *Hodges v. Mayor of Liskerret (a)*, where Houghton, J., says, for the first two grounds he cannot justify commitment.—[FITZGERALD, J. The Mayor is called the officer of the King.]—The Mayor must have been a Magistrate, as Lytle was, though not acting as such. *Archbold Cr. Pr.* contains no precedent for such an indictment. Lord Denman gives the reason why an indictment is given in the case of a Magistrate:—because it is an actual obstruction to the course of justice. How would this apply to the case of the governor of the Bank of England or the chairman of the East India Company while it existed? Now as to the libel counts:—The resolution mentioned is not illegal; not an unlawful resolution, but stated to have been duly passed. All this says is, that the Mayor had done an illegal act. Is that a libel?—[O'BRIEN, J. The charge is, that he conspired with others for passing a resolution. He alleges that it was illegal.—FITZGERALD, J. What was the meaning of describing the Mayor as officer of the King?]

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Joy cited *Tomlin's Law Dictionary*, word "Mayor."

FITZGERALD, J.

The information filed in this cause contained nineteen counts, charging the defendant with certain alleged misdemeanours, to which there was a plea of not guilty, and also special pleas. A general verdict was given against the defendant, who has now moved to arrest the judgment.

The first twelve counts of the information charged the defendant with using certain defamatory language to the prosecutor, who was Mayor of the borough of Belfast, with intent to vilify him and degrade his office. The thirteenth, fourteenth, fifteenth, and sixteenth counts charge the use of the same language, with in-

(a) 2 Bul. 139.

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tent to provoke the prosecutor to commit a breach of the peace; and the last three counts are for the publication of a malicious libel. The prosecutor has recently, and with the consent of the Attorney-General, entered a *nolle prosequi* on the thirteenth, fourteenth, fifteenth, and sixteenth counts; and the notice before us is to arrest judgment on the first twelve and on the last three counts.

The defendant submits to us as to the last three counts that, although the jury, in execution of their peculiar province in libel cases to pronounce on both law and fact, have decided that the publication in question is a malicious libel, yet that it is open to him on this notice to point out to the Court that on its fair and reasonable construction it is not libellous; and to ask us, therefore, to refrain from pronouncing judgment against him on these counts. The statute (Fox's Act) preserves his right to move in arrest of judgment.

The last three counts are founded on the same publication; and it is not necessary for me now to read or comment on it. I may pass by this part of the case very shortly; indeed it was not very much pressed on the Court in argument. It seems to me that, on a just and reasonable construction of the publication in question, it is a libel on the prosecutor, tending to bring him into public discredit, by imputing that his conduct had rendered him liable to be prosecuted for a conspiracy to effect an object alleged to be illegal; and that in the happening of certain events, the consequences of the conspiracy, he and others would become chargeable "as conspirators, with the felony of murder." Judgment should, therefore, in my opinion be given against the defendant on the last three counts.

The residue of the motion embraces the first twelve counts of the information. It is necessary only to state the first count, as the same rule must apply to all.—[See Statement, p. 584.]—The count states that the prosecutor was elected Mayor on the 1st of December 1862, to hold office for the residue of that year and for 1863; and that the language complained of was used at a meeting of the Council held on the 1st of January 1863. Upon referring

to the Municipal Corporation Act, it will be apparent that the meeting of the 1st of January 1863 could not have been held either for the purpose of revising the burgess-roll or for the admission of freemen, or for any other judicial or quasi-judicial purpose.

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The language complained of is no doubt of a very defamatory character. It imputes corruption to the prosecutor; but so far as it imputes corruption in his conduct as Mayor, it does not specify what that corruption was; and it has generally a tendency to degrade and vilify the prosecutor as Mayor of the borough. It is important to bear in mind that the Mayor was then presiding as *ex officio* chairman at a fiscal meeting of the Town-council, and was not in the exercise of any magisterial or judicial duty. The position and duties of the Mayor are defined by the Municipal Corporation Act, 3 & 4 Vic., c. 108. By section 57, and subsequent sections, he is to be elected by the Town-council from amongst their own body, and they are elected by the rated occupiers. He is to hold office for a year. Section 84 makes him, *ex officio*, a borough Justice of the Peace during his mayoralty, and gives him, as such, precedence within the borough. Section 8 empowers him to examine into the claims of persons to be placed on the freeman's roll, and, if established, to admit them. Section 9 gives an appeal to the Court of Queen's Bench. Sections 45 and 46 empower him to preside, aided by assessors, at the annual Court for the revision of the burgess-roll. Sections 49 and 50 regulate the appeal to the Court of Queen's Bench.

The fiscal and general business of the Corporation is managed by the Council, of whom the Mayor is one, and by section 92 the Mayor is to preside at meetings of the Council; but in his absence any other member of the Council is qualified to preside. At those meetings every member of the Council is entitled to be present, and to speak and take a part in its proceedings and declarations, and every question is decided by a majority of votes. It will be seen that the Mayor fills three distinct capacities. First; he is, *ex officio*, a Justice of the Peace, and as such chief Magistrate of the borough. Secondly; he is, *ex officio*, a judicial officer for the admission of freemen and revision of the burgess-roll. Thirdly;

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he is, *ex officio*, chairman at meetings of the Council. It was whilst presiding in this latter capacity at a meeting of the Borough-council that the defamatory language in question was addressed to the prosecutor by the defendant, one of the Council, in the course of a debate on a fiscal matter. The defendant's Counsel contended that, as a general rule, an indictment or information did not lie by the Common Law for defamatory words, unless they were calculated to provoke a breach of the peace, and were so laid; and further that, although there were certain exceptions resting on grounds of public policy, the present case did not range within them. He further called our attention to this, that there was no precedent to be found in any of our books for an information or indictment such as that here before us; and he alleged that there was no real authority to support it. He called on us not to make a new precedent. The prosecutor's Counsel, on the other hand, contended that the present case was governed by decisions to which he referred; and further, on general principles, that to traduce a public officer of such a position of authority as the Mayor of a borough, whilst in the execution of his duty, was a grave offence against the public, punishable by indictment, or at least cognizable and punishable in this Court by information.

A number of cases were referred to of criminal prosecutions for defamatory words spoken in relation to Justices of the Peace, which I may pass for the present without much observation. It seems to have been held from an early period that an indictment lay for defamatory language of a Justice of the Peace, addressed to him whilst in the execution of his duty as a Magistrate. It was alleged on the part of the defendant that the reason was, that such language, used under such circumstances, was a disturbance of the course of public justice; and that those cases were not precedents for the present informations. Other reasons are deducible from the cases themselves to render them inapplicable as authorities.

It is to be borne in mind that Justices of the Peace are Judges of record appointed by the Queen, deriving their authority from her as the fountain of Justice, and appointed as conservators of the peace, and for the execution of the several matters coming within

the limits of their commission, and, amongst others, the punishment of offenders against the law, and to compel certain evil-doers to find sureties for the peace and for good behaviour. A Justice of the Peace, as such, is peculiarly protected by the law in the just execution of his office; and if slandered in his presence, and in the execution of his duty, the offender is liable to be punished, and may be indicted, or required to find sureties for good behaviour, or perhaps be committed by the Justice.

Having regard to these considerations, it seems to me that the defendant's contention that the Magistrates' cases do not govern the present is well founded. Their effect, too, is further limited by another class of similar cases, from which it appears that an indictment cannot be maintained for defamatory words spoken *of* a Justice of the Peace, but not *to* him, or in his presence, in the execution of his duty: *ex. gr.*, per Lord Holt, in *Rex v. Wrightson* (a), where the words were of a Justice of the Peace, and in reference to a warrant he had issued. In *Rex v. Burford* (b) the Court quashed the indictment, seeing it disclosed no crime, but good cause to bind the defendant to be of good behaviour. So in *Rex v. Soley*, where corruption was imputed to a Justice, but not in his presence; *Rex v. Pocock* (c), where the words spoken *of* a Justice of the Peace, "that he was a forsworn rogue;" and *Rex v. Metge* (d), where Lord Ellenborough expressed his opinion that an indictment did not lie which charged the defendant with saying of a Justice that he was a liar and a scoundrel, with intent to defame him as such Justice; and *Ex parte the Duke of Marlborough* (e).

Some propositions were urged in the course of this discussion, which, as they bear on the question in controversy, and are of great practical importance, I ought not to pass over in silence. It was suggested that an information might be maintained in this Court on a charge for which no indictment would lie. No authority was cited for this position; and unless coerced by authority I must adhere to the more constitutional doctrine that a criminal infor-

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(a) 2 Salk. 697.

(b) 2 Keb. 494.

(c) 2 Stra. 1157.

(d) 2 Camp. 142.

(e) 5 Q. B. 955.

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It was next said that the Mayor might have committed the defendant to prison for his words as for a contempt. There is no authority whatever for this suggestion. And again, it was urged that an indictment or information lies in all cases for such language or conduct as would warrant a committal for contempt, and this was sought to be applied as a test in the present case. The proposition is too large. No doubt there are cases in which the offender may be seriously punished for conduct which amounts to a contempt; or he may be indicted for the same offence where it amounts to a misdemeanour; but the more numerous class of misfeasances coming under the general category of "contempts" can only be reached summarily, and dealt with *flagrante delicto* by the presiding Judge.

I have now to consider the main question on the authorities principally relied on for the prosecution. *Hodges v. Hemphan* (Mayor of Liskerrett) (b) was cited by Mr. Joy as applicable, and was very much pressed. It was a return to a *habeas corpus* directed to the Mayor; and the cause of imprisonment certified was "*quia se male gessit*," and for using indecent speeches to the Mayor, and that in his hall, with a spit, "*insultum fecit et conatus fuit etiam eum vulnerare*." The defendant was discharged. It is not easy to make the case intelligible, and I should rather infer that the Mayor was a Justice of the Peace, and that the assault was committed, and indecent language used to him in that capacity. Haughton, J., says:—"The Mayor is *conservator pacis*, and may keep the peace from being broken as against himself." And Croke, J., says that "For one to say that the Mayor is a liar, is punishable, for this is the way to bring him into contempt; and therefore he ought, and that deservedly, be punished for this; but

(a) 5 Mod. 459.

(b) 2 Bulst. 139.

"*the manner of his punishment ought to be observed;*" and he puts it on the ground "that he is a person in authority—*law officer of the King.*" The case decides nothing; and if the *dictum* of Croke, J., is to be read as affirming that to call a person in authority a liar is punishable by indictment or information, it would not be adopted at the present day. The manner of the punishment may possibly be by sureties for good behaviour. The case is not reported in *Croke* or in any of the contemporaneous reports; and it is to be observed that *Bulstrode's Reports* were not published in his lifetime. The *Anonymous case* in *Sir F. Moore's Reports*, p. 247, which was cited also by Mr. Joy, is, as my Brother O'BRIEN pointed out, the same case reported *Cro. Eliz.*, p. 78, as *Simmons v. Sweete*: it was there held that contemptuous words spoken of the Mayor of Barnstaple would not justify imprisoning the speaker, but he might have been bound to be of good behaviour; and it is added, "Yet if the Mayor had been in a public place of justice, and he had called him such opprobrious words, he might imprison him." I infer from that report that the Mayor was a Justice of the Peace, and that the meaning of the case is, that for opprobrious words used to the Mayor, whilst sitting in a public place of justice as a Magistrate, he might have imprisoned him. *Rex v. Langley* was relied on; it is reported in three books, but the fullest in 2 *Lord Raymond*, p. 1029. The defendant was indicted for speaking certain words of the Mayor of Salisbury. They were spoken to him, and it was urged on demurrer to the indictment that, though they were laid to be spoken of the Mayor, it did not appear that they were spoken of him whilst in the execution of his office. It was urged for the indictment, that the words were indictable, because they reflected on the Mayor's integrity, and it concerned the public to maintain the honour of Magistrates. Holt, C. J., says:—"The Mayor had done well to have bound the defendant over to his good behaviour. It is a disparagement of the Government to put an ill man into office." Powell, J.:—"If the Mayor had been in the execution of his office he might have committed the defendant. But what remedy is there when the officer cannot commit the offender?" On a subsequent day it

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was urged that the words were spoken in Sarum, and so within the jurisdiction of the Mayor, where he is always in the execution of his office. Holt, C. J., says :—"It does not appear that the Mayor is a man of worship, that he is a Justice of the Peace; for though he be a Mayor it does not follow that he is a Justice." Powell, J. :—"These words spoken to the Mayor's face tend to the breach of the peace." Holt, C. J. :—"They are not a breach of the peace, but they may provoke to it; but I do not know what power the Mayor has." Powell, J. :—"He is head of the body politic, and it is an office which concerns the Government." Holt, C. J. :—"These words do not tend to a breach of the peace, whether spoken in the presence of the Mayor or in his absence. A Magistrate may commit the party, but the commitment must be made presently." The indictment was quashed. Holt, C. J. :—"It is not said that the Mayor was a Justice of the Peace, nor that he was in the execution of his office. These words are cause to bind the defendant to his good behaviour." Whatever view may be taken of this case it certainly is no authority for the prosecution.

In *Rex v. Cranfield* (a) the defendant was indicted for saying "The Mayor and Aldermen of Hatfield are a pack of as great villains as any who rob on the highway, and we will take away their charter." Motion on arrest of judgment. The motion dropped, but in 12 *Mod.*, p. 98, it is again mentioned, and the Court say :—"We are not satisfied that the words are such as they may be indicted for: for *what is it to the Government* that the Mayor and Aldermen are rogues."

I have now adverted to the cases which were most relied on for the prosecutor; and, in my opinion, none of them afford any authority, or even any clear and authoritative *dicta* to support the present information, and there is much to be found in them to sustain the defendant's contention.

My Brother O'BRIEN has referred us to two cases not cited in the argument, but which are of importance :—*Rex v. Rogers* (b), in which an information had been exhibited in the Mayor's Court of London, against the defendant, for assaulting the alderman

(a) 5 *Mod.* 203.

(b) 2 *Lord Ray.* 777.

of the ward whilst presiding at the wardmote, and on the same occasion using to him opprobrious language. Upon a *certiorari* the Court of Queen's Bench awarded a *procedendo* as to the assault; but as to indictment for the words, Holt, C. J., said:—

“That as no information or indictment would lie for these words at Common Law, it was a great question whether the custom relied on could be good; for the Common Law has provided a proper remedy for such scandalous words—viz., binding to be of good behaviour; such words being a breach of the peace.” The other case is *Rex v. Nems* (a), which is worthy of attention as showing that the ground on which an indictment lies, for defamatory words spoken to a Justice of the Peace whilst in execution of his duty is, that it is “a vilifying the authority of the Queen's commission, and so is a public crime.” And a similar rule is to be deduced from *Rex v. Darby* (b), viz., that defamatory words of a Justice of the Peace are a reproach to the Government by whom he was appointed, and reflect on the public government, and are therefore punishable by information at suit of the Queen.

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There is a class of cases very numerous indeed—viz., cases in which members of Municipal Corporations have been deprived of office for misconduct contrary to their duty as burgesses, and against the interests of the borough; but I am not aware that it was held in any of them that the use of opprobrious language to the head of the Corporation, whilst in the execution of his duty, was cause of deprivation. If there is such a decision, it has not been cited.

From the authorities I have adverted to, and others which have been brought before us, I am led to deduce certain conclusions:—First, a general rule that an information or indictment cannot be sustained for defamatory words—namely, unless they amount to a breach of the peace, or were spoken with intent to provoke a breach of the peace. Secondly; that, on grounds of public policy, an indictment or information lies for such words spoken to a Justice of the Peace whilst in the execution of his office. Thirdly; that opprobrious words spoken of a Justice of the Peace, as such, but not

(a) Gilb. Rep. in K. B. 36.

(b) Carth. 14.

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to him, are not punishable by indictment or information, but may, in a proper case, be made the foundation of compelling the offender to find sureties for good behaviour. Fourthly; that none of the authorities or precedents produced support the present information.

The case, then, seems to me to come before the Court as one unsupported by authority or precedent, and with no clear principle to warrant it. The argument that no precedent or authority can be produced for such an information as this, becomes more forcible when we consider the great number and antiquity of our municipal Corporations, and that from their popular constitution and the freedom of speech enjoyed, instances of abuse of that privilege must have been of very frequent occurrence. But it has been suggested, though with hesitation, in the course of the argument, that if a precedent is wanting we should make one, where the principle is clear. There are some passages to be found in *Hawkins' P. C.* to justify the suggestion. In treating of the Court of Queen's Bench, and the plenitude of its power, he says:—"That wherever it "meets with an offence contrary to the first principle of justice, and "of dangerous consequence if not restrained, it adopts a proper "punishment to it; and also that it has jurisdiction over all mis- "demeanours of a public nature tending to a breach of the peace, to "oppression or faction, or any manner of misgovernment; and, for "the better restraining of such offences, it has a discretionary power "of inflicting exemplary punishment, either by fine or imprisonment, "or other infamous punishment, as the nature of the crime may require." The doctrine of *Hawkins* would be, to use his words, "of dangerous consequences if not restrained" within proper limits; and I am by no means disposed to adopt it in its widest sense. If it is to be taken as asserting for this Court a power to add, of its own authority to the category of crime, a new misdemeanour, because it considers the act contrary to the first principles of justice, or rather some general principle, I would be disposed to disclaim such a power, as dangerous and unconstitutional; and if such a power exists, it seems to me that there is nothing in the present case to call for its exercise. *Hawkins* rests very much on the passages I have quoted on the authority of Lord Coke, to whom

Lord Ellesmere, in his observations, administers a just reproof on this very subject. In *Bagg's case*, in the second part of the Reports, 93 B, whilst treating of the causes of disfranchisement of members of Corporations, for acts against the duty of a citizen or burgess, much is said that goes far beyond the points in controversy; and in a note at 98 A will be found Lord Ellesmere's observations. He says:—"The point in question only was, what cause was sufficient for a Corporation to remove a burgess from his place? He digresseth from his matter, and saith it was resolved that to the Court of King's Bench belongeth authority, not only to correct error in judicial proceedings, but other errors and misdemeanours extra-judicial, tending to the breach of the peace or to the oppression of subjects, or to the raising of faction controversies, debates, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punishable by due course of law. Therein giving excess of authority to King's Bench; he hath as much as insinuated that his Court is all-sufficient in itself to manage the State; for, if the King's Bench may reform any manner of misgovernment (as the words are), it seemeth that there is little or no use either of the King's royal care and authority, exercised in his person, and by his proclamations, ordinances, and immediate directions, nor of the Council Table which, under the King, is the chief watch-tower for all points of government."

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The *dicta* of Lord Coke and the observations of Lord Ellesmere lose much of their weight when we call to mind that they were the principles in the great controversy then existing between the Court of King's Bench and the Court of Chancery. Lord Coke asserting the omnipotence of the King's Bench, "and that the Judges of that Court were the superintendents of the realm:" the Chancellor, on the other side, advocating the absolute power of the King's High Court of Chancery.

The conclusion at which I have, on the whole, arrived, is, that judgment ought to be arrested on the first twelve counts; but I announce my opinion with the greatest doubt as to its correctness.

The case now before us, in itself, is of small consequence, but it

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involves considerations of great importance to the public. If we should hold this information maintainable as to the first twelve counts, it must be on a principle equally applicable to the meetings of all municipal Corporations and Towns Commissioners acting under the Towns Improvements Acts, and probably also to meetings of boards of guardians and of other public bodies of a like character. The tendency of such a rule would necessarily be to check freedom of debates at such assemblies, and to place a dangerous power in the hands of the Mayor or other chairman. If he should think fit to prosecute, as a criminal, the person imputing corruption or other misconduct to him, the mouth of his adversary is closed; for the defendant in such a criminal prosecution could not be received as a witness, nor permitted to prove the truth of the imputations alleged to be defamatory. The defendant in the present case did put in special pleas alleging the truth of the charges he had made; but if, in place of taking issue on those pleas, the prosecutor had demurred, the judgment of the Court must have been given against the pleas. On the other hand, no evil is likely to ensue from our holding that this information does not lie for words merely. There are other and not inadequate remedies. The Mayor could, no doubt, exclude a member of the Council who was disturbing the proceedings of the meeting; or he could take steps to compel him to give sureties for good behaviour, or institute an action where there was actionable misconduct. The bye-laws of the Corporation may also be so moulded as to insure propriety of language and conduct at the meetings of the Council.

I have, in conclusion, to observe that the Court, when granting to the prosecutor a conditional order for leave to exhibit this information, entertained and expressed doubt on the question, but no cause was shown, and the order was made absolute by consent.

HAYES, J.

As to the last three counts of this information, the Court is, I believe, unanimous that the motion in arrest of judgment ought to be refused. With respect to the first twelve counts, the objection raised by the defendant is, that they do not, nor does any of them,

disclose any offence known to the law; and in support of this position to seek to establish the principle that it is not competent for this Court to entertain a criminal information, unless it disclose on its face some offence for which an indictment can be shown to lie. I do not accept this as a perfectly correct statement of the law, though the general scope and intent of the two proceedings by indictment and by criminal information, for the punishment of misdemeanours, are pretty much the same. As to the powers of this Court, Serjeant *Hawkins* (a) tells us that "Whatever crime is manifestly against the public good, it comes within the cognizance of this Court, though it do not directly injure any particular person." And the same learned writer tells us, "It is not necessary in a prosecution of any such offence in this Court, to show a precedent of the like crime formerly punished here, agreeing with the present in all its circumstances; for this Court, being the *custos morum* of all the subjects of the realm, wherever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it:" 2 *Hawk*, c. 3, s. 3.

I utterly disclaim any intention of arrogating for this Court a power of enunciating new offences, by which I understand the pronouncing of a certain act to be criminal, which, until it was so announced, was not criminal, but merely of asserting for this Court, not merely the power, but the duty of applying to cases as they arise, in the changes and progress of society, the general principles which for ages have been declared as the great land-marks of our law, and the guarantees of peace and good order. In such a case, though we make a precedent for other Courts to follow, we do not create, but only expound and apply a pre-existing principle. The Court, then, having the power to punish offences of the character I have mentioned, is there anything in the mode of prosecution by criminal information which renders it inapplicable in any of the foregoing cases? I am content to abide by the answer supplied by Serjeant *Hawkins*, who, when adverting to the distinction that had been taken between wrongs done principally to another, and those done principally to the King himself, says [*B.* 2, c. 26, s. 1]:—"I do not

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(a) 1852, c. 3, s. 3.

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 "practice, agreeable to numberless precedents, to proceed by way of
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 "Master of the Crown-office, for offences of the former kind, as
 "well as for offences done principally to the King, as for libels,
 "seditious words, contempts, and in general any other offences
 "against the public good, or against the first and obvious principles
 "of justice and common honesty." Now, is the offence charged
 in this information one against the public good?

The Mayor of a borough, as the name imports, is head of the Corporation; and by the Municipal Corporations Act (3 & 4 Vic., c. 108, s. 84) is a Justice of the Peace, and has precedence in all places within the borough. It is his duty to be usually resident in the borough; and for the better transaction of municipal affairs, he is the person appointed to preside at all meetings of the Town-council at which he shall attend; and if not present, then the Council is to elect some other member to preside [section 91]. As such president of a deliberative body, it is his duty to preserve order and decorum, and to have the business conducted with regularity and decency. For all these purposes, and for the better sustainment of the authority with which he is entrusted, it is highly important to the public, not only that the office, but the individual elected by his fellow-citizens to fill that office, should command their respect and obedience. If his authority, while discharging the duties of his office, be recklessly gainsaid, his lawful commands disobeyed, and himself made the subject of open insult and reproach, it is manifest that the public interests of the municipality must suffer; in short, that the affairs of the borough will be left undone, and must go to decay and ruin; for the well-ordered citizen, ready and willing though he may be to render his assistance in the conduct of those affairs, will not give his attendance when he is convinced that, from circumstances of habitual recurrence, that attendance has become not only disagreeable to himself but useless to the public. If such be the consequences that are likely to ensue, it appears to me that this Court would ill discharge its duties as *custos morum* of the subjects of the realm, if it refused to give its protection to the

officer on whom the Legislature and the public have cast such important duties, and by so doing endeavour to repress an offence which manifestly is of such dangerous consequences to the public. It has been argued that the protection here sought ought only to be given to Justices who have been insulted or obstructed while discharging their judicial functions. No doubt many cases may be cited in which this Court has promptly rendered assistance to Justices who have so suffered, and that has been done out of the great regard and anxiety which it has for the proper and pure administration of justice. But those are only instances, and by no means embrace all the objects of this Court's protection. In the present case, the Mayor is, by virtue of his office, a Justice of the Peace; but I do not rest my opinion on that. I think any other member of the Town-council, called on to preside in the absence of the Mayor, though not a Justice, would be equally entitled to our protection. For that protection being granted, not so much out of regard for the office or the person filling it, as for the sake of the public, for whose benefit the office has been instituted, it matters little whether the officer seeking our protection in matters not immediately connected with the administration of justice, be or be not a Justice of the Peace. In either case the injury to the public is the same. It has been asked at the Bar, if the protection by criminal information be conceded to the Mayor of Belfast, acting in his office as president of the Town-council of his borough, where are we to stop? Is it to be given to every Mayor of even much smaller boroughs? Is it to be conceded to every chairman of Town Commissioners, or of a board of Poor-law Guardians? The answer is briefly this:—If the criminal information lies upon the principles I have mentioned, it will always be in the sound discretion of this Court, whether it shall or not be granted in any particular case in which it may be sought.

On the whole case, I am of opinion that the defendant's motion in arrest of judgment ought not to be complied with.

O'BRIEN, J.

With respect to the last three counts of the information (numbers seventeen, eighteen, and nineteen), I concur with my Brothers

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HAYES and FITZGERALD in opinion that they are sustainable, and that as to them the judgment should not be arrested. The publications complained of in those counts charge Mr. Lytle with conspiracy, which is an indictable offence, and they are, therefore, clearly libellous. A *nolle prosequi* has been entered on four others of the counts (numbers thirteen, fourteen, fifteen, and sixteen), so that it is necessary only to consider the first twelve counts, as to which a very different question arises from that on the last three counts. The case as to these twelve counts has been argued on the first count, which contains a full account of all that took place at the meeting of the 1st of January 1863, and of the language used by the traverser on that occasion; and it was conceded by Counsel in the argument that, if the judgment should be arrested on that first count, a similar rule should be made as to the eleven subsequent counts. The language used by the traverser, as mentioned in the first count, has been truly designated as gross and unwarrantable; it was abusive in its terms—charging Mr. Lytle with corruption and misconduct in the discharge of his duties, and with a conspiracy to pack the burgess-roll. If this slanderous language had been made the subject of a civil action by Mr. Lytle, he would have been entitled to exemplary damages; but the question for our consideration is, whether such language, used on the occasion that it was, and with the object and intent charged in the first count of the information, are the subject of a criminal proceeding by information or indictment.

It is, in my opinion, clearly settled (and it has not indeed been disputed by the prosecutor's Counsel, in the argument) that a criminal information will not lie for any offence which would not be the proper subject of an indictment. In *2nd Hawkins' Pleas of the Crown*, c. 26, s. 5, which has been referred to, it is stated, "That an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the officer who exhibits it; and that whatever certainty is requisite in an indictment, the same at least is necessary also in an information; and, consequently, as all the material parts of the crime must be precisely found in the one, so must they be precisely alleged in the other."

And, according to the definition of an information in *4th Bacon's Abridgment* (p. 402), it can only be exhibited against a person for some criminal offence.—[See also *Ex parte Chapmen* (a), and *Archbold's Criminal Pleading and Evidence*, s. 1 and s. 2, according to which a criminal information only lies for misdemeanours]. The result of these and other authorities is, that an information will only lie for such offences as are grounds of indictment, while there are some indictable offences for which it will not lie. The question then for our consideration is, whether the first count shows that the traverser committed an indictable offence. The prosecutor's Counsel contend that it does, on the ground that the slanderous words therein complained of, charging Mr. Lytle with conspiracy and corruption in the execution of his office as Mayor, were spoken to him, as therein stated, while (in the execution of his said office) he was presiding over a meeting of the municipal body; and were spoken with the intent to degrade and bring him to contempt in the execution of that office.

It is also clear, as a general rule, that an indictment will not lie for mere words spoken, however slanderous or abusive they may be, and even though they are such as would be the ground of a civil action without laying special damage. To this general rule there are, however, various exceptions, to some of which I will refer. Indictments will lie for blasphemous or seditious language; for words spoken to provoke a breach of the peace by their inciting either to a challenge or to personal violence; and also for words spoken to a Judge or a Magistrate *while in the discharge of his duties as such*. And we have to consider whether the present case also constitutes an exception to that general rule, on the ground that the slanderous words were spoken to Mr. Lytle while in the discharge of his duties *as Mayor*, and with intent to degrade and vilify him in the execution of said office. It is true, that as Mayor of Belfast Mr. Lytle was also a Magistrate, but it does not appear on the information, and was not even suggested during the argument, that, on the occasion in question, he was at all acting as a Magistrate. The meeting over which he presided is stated in

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(a) 4 Ad. & El. 773.

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the information to have been held for the transaction of municipal business; but his Counsel contend that, as those slanderous words would have been indictable if spoken *to a Magistrate* while acting as such, and spoken of him in the execution of his office, and with the intent charged in the information, they should be considered equally so when spoken with that intent *to a Mayor*, while acting as such, and spoken *of him in the execution of that office*.

We have been referred to several cases on this subject. I have examined them carefully; and in my opinion none of them establish the proposition contended for by Mr Lytle's Counsel, while some of them are authorities against it. In four of the cases cited, viz., *Rex v. Burford* (a), *Rex v. Darby* (b), *Rex v. Wrightson* (c), and *Rex v. Revel* (d), the words were spoken of Magistrates, and not of Mayors. Thus, in *Rex v. Burford*, very contemptuous words were spoken of Magistrates in their absence, and the indictment was quashed, upon the ground that the use of the words constituted no crime, though they were a ground for binding the traverser to good behaviour. In *Rex v. Darby* offensive words were also spoken of a Magistrate, as such, imputing ignorance and incompetence against him. According to the report in 3 *Modern*, the indictment was held good, upon the ground, amongst others, that it was a scandal to the Government to say that the King had appointed an ignorant man to be a Magistrate. Even if that case was decided upon such a ground, the reasoning would not apply to the present, as Mr. Lytle's office of Magistrate was consequent upon his appointment as Mayor, which was made by the corporation, and not by the Crown; but it further appears by the observations of Gould, J., in the subsequent case of *Rex v. Langley* (e), that the report of *Rex v. Darby*, in 3 *Mod.*, is incorrect, and that the decision in it was, that the words were *not* indictable. That case is therefore no authority for the prosecutor in the present one. In *Rex v. Wrightson* very contemptuous words (as fool, &c.) were also spoken of a Magistrate, as such;

(a) 2 Keble, 494; S. C., 1 Ventris, 16.

(b) 3 Mod. 139.

(c) 11 Mod. 166; S. C., 2 Salk. 698; Holt, 354.

(d) 1 Strange, 420.

(e) 2 Lord Ray. 1029.

but it was held they were not indictable; Holt, C. J., stating that words spoken in disparagement of a Justice's capacity were not indictable, though they were a breach of good behaviour. With respect to the case of *Rex v. Revel* (a), it appears by the report that the words which were held indictable, viz., "*you are a rogue and a liar*," were not only spoken of a Magistrate, but were also spoken to him, while in the execution of his office. But Mr. *Brewster* relies further on the reason assigned by the Court for holding those words to be indictable, namely, that it was conceded that the Magistrate might have committed the defendant for contempt in using them; and he argues that, for a similar reason, the words used by the traverser in this case should be held indictable, because, as he contends, Mr. Lytle had unquestionably the power of committing the traverser for them. But, according to the judgment of Holt, C. J., in the previous case of *Regina v. Rogers* (b), the fact that a Magistrate might commit a party for contempt, for using offensive words to him while acting as such, does not establish that such words are indictable. With respect to the words in that case, Holt, C. J., after stating (c) that the Magistrate might bind the party to his good behaviour, or, if he had no sureties, commit him till he find some, then says:—"So, in this Court, if a witness be insolent we may commit him for the immediate contempt, or bind him to his good behaviour, but we cannot indict him for it; and this is the course according to the Common Law of England." I shall have occasion again to refer to that case, which was not cited in the argument.

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Mr. Lytle's Counsel have referred to some cases in which the offensive language was spoken of a Mayor. My Brother FITZGERALD has already observed upon the cases of *Hodges v. The Mayor of Liskerrett* (d) and *Simmons v. Sweete* (e)—reported in *Sir F. Moore*, p. 247, as *Anonymous*—and *Rex v. Cranfield* (f), which have been also relied on; and I concur with him in opinion

(a) 1 Strange, 420.

(b) 2 Lord Ray. 777; S. C., 7 Mod. 29; Holt, 331.

(c) 7 Mod. 29.

(d) 2 Bulst. 139.

(e) Cro. Eliz. 78.

(f) 5 Mod. 203; S. C., 12 Mod. 98.

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that they do not establish the proposition contended for. In *Rex v. Cranfield* it appears, from the report in 12 *Mod.*, p. 98, that the Court were of opinion that the words (though of a highly opprobrious character) were not indictable, and that the judgment would have been arrested only that the defendant had passed the time when, according to the then practice, a motion in arrest of judgment should be made. Prosecutor's Counsel also cited the case of *Rex v. Baker* (a), where the defendant was indicted for saying of the Corporation of Hull that, "whenever a burgess of Hull came to put on his gown Satan entered into him." In that case, the indictment was quashed, upon the ground of informality in the conclusion, but Counsel rely on the observation stated by the report in 1 *Mod.*, to have been made by Kilynge, C. J. (in answer to the objection of the words themselves not being indictable), namely, that the words were "*a scandal to the Government.*" That observation does not appear in the report in 2 *Keble*; and, if it implied that the words were indictable, it is directly opposed to the case of *Rex v. Cranfield*, already mentioned, and to other cases, particularly that of *The Duke of Marlborough* (b), which decide that, even in the case of a Magistrate, words, which would be indictable when spoken to him in the execution of his office, are not indictable when spoken in his absence, though spoken of him as a Magistrate.

We have been also referred to the case of *Regina v. Langley* (c), in which an indictment for saying to the Mayor of Salisbury, "you are a rogue and a rascal," and every other offensive word to him, was quashed by the Court, upon the ground that the words were not indictable. The decision in that case is therefore no authority for the prosecutor in the present; but Counsel have relied upon some observations of Holt, C. J., in giving judgment. It did not appear by the indictment that the Mayor was a Magistrate; and according to the report in *Holt*, p. 654, the Chief Justice said:—"These words are not indictable, because the Mayor was not in the execution of his office, nor a patent officer." And this is relied on as showing that, in the opinion of Chief Justice Holt, the words

(a) 1 *Mod.* 35; S. C., 2 *Keble*, 594.

(b) 5 Q. B. 955.

(c) 2 *Lord Ray.* 1029; S. C., 2 *Salk.* 697; 6 *Mod.* 125; and *Rep. temp. Holt*, 654.

would have been indictable if they had been spoken to the Mayor while in the execution of his office. It appears to me however, from other parts of his judgment, that such a construction should not be put upon it. He explained the foregoing observation, by adding:—"For it would have altered the case if he had been a Justice of the Peace by commission from the Queen, when indictment should have laid, because the words would have been an aspersion upon the Queen and Government in general, by whom he was employed. It doth not appear that he was a Justice of the Peace; or, if he was, that it was by appointment of the Queen, but of the corporation." If Chief Justice Holt was of opinion that the fact of the words having been spoken to the Mayor, in the execution of his office as Mayor, would of itself have rendered the words indictable, it would have been unnecessary for him to have referred to the circumstance of the indictment not stating that the Mayor was a Magistrate; or to the distinction (to which I have already referred) between the case of a Magistrate appointed by the Crown, and that of one appointed by the corporation. He also stated (a):—"This is an extraordinary thing, to indict a man for these words." And, again (b):—"Words that directly tend to breach of the peace may be indictable, but otherwise to encourage indictments for words would make them as uncertain as actions for words are." It further appears, from the report in 6 *Mod.*, that the Court stated that the defendant might have been forced to find sureties for his good behaviour, or, in default thereof, might have been committed. And also, that, "binding the defendant to his good behaviour was sufficient to secure the authority of Mayors." I think therefore that the several observations made by Chief Justice Holt in that case, when considered together, do not sustain the proposition that even where a Mayor, by virtue of that office, is also a Magistrate, slanderous words spoken to him, while acting merely as Mayor, and not as Magistrate, or in any judicial character, are properly the subject of indictment.

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Counsel have also relied on the observations of the Court, in the

(a) 2 Lord Ray. 1030.

(b) 6 Mod. 125.

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case of *Rex v. Symonds (a)*, in which a Mayor applied for a criminal information against the defendant, for having struck him while in the execution of his office; but the application was refused, on the ground that the Mayor had, in the first instance, struck the defendant; and the Court observed, "That, though a *Magistrate* "was protected by law while in the execution of his office, yet, "in that case, he had forfeited such protection, by himself striking "first." This observation applies only to the case of a *Magistrate* while acting in the execution of that office. The assault upon the Mayor in that case was clearly the subject of an indictment, whether he was acting in that capacity merely, or as a *Magistrate*; and the Court, in consequence of his misconduct, refused to interfere by information, and left him to his remedy by indictment. The cases of *Ashton v. Blagrove (b)*, and of *Onslow v. Horne (c)*, have also been referred to; but those were cases of *civil actions*, brought for slanderous words. The former case merely decided that words spoken of a *Magistrate*, and imputing corruption to him, were actionable: and, in the latter case, the judgment was arrested, on the ground that the words stated in one of the counts were not actionable; De Grey, C. J., stating [p. 186] that words were actionable which, when spoken of one in an office of profit, might cause the loss of his office, or which, when spoken of persons touching their respective profession, trade, or business, might tend to their damage. But it by no means follows that words which are actionable are also indictable; and those two cases therefore do not govern the present. With respect to the cases of *Rex v. Pocock (d)*, and *Rex v. Weltje (e)*, they merely show that no information or indictment would lie for slanderous words spoken of a *Magistrate*, with respect to his conduct, as such, if spoken in his absence; although it would lie if such words were spoken to him in the execution of his office.

I have referred to these several cases in detail, as they were

(a) *Cases temp. Hardwicke*, 227.

(b) 1 *Strange*, 617; S. C., 8 *Mod.* 270; 2 *Lord Ray.* 1368.

(c) 3 *Wilson*, 177.

(d) 2 *Strange*, 1157.

(e) 2 *Camp.* 142.

much pressed by Mr. Lytle's Counsel as authorities in support of the proposition. They contend that the slanderous words in the present case are indictable, because when they were spoken to Mr. Lytle he was acting as a Mayor, though not as a Magistrate. I think that the foregoing review of them shows that neither the decisions in those cases, nor the observations of the Judges who decided them, can be relied on as authorities for that position; and I shall now refer to two other cases, not cited in the argument, which would appear authorities the other way; the first is that of *Regina v. Rogers* (a), which I have already mentioned. In that case an information was filed against the defendant in the Lord Mayor's Court in London, for having assaulted an Alderman, presiding as such at a wardmote, and for having used contemptuous and offensive language towards him while so presiding. On a *certiorari* having issued from the Court of Queen's Bench, it was decided that "a *procedendo*" should be granted as to the assault only, but not as to the words. The Alderman's Counsel relied upon a custom in London, that an information might be exhibited in Lord Mayor's Court against any citizen who assaulted or spoke defamatory words of an Alderman of London, being in the execution of his office; but Holt, C. J. (b) said:—"That, since no information nor indictment will lie for these words, at Common Law, it was a great question whether this custom to proceed in another manner than the Common Law would allow, for words, would be good." He then added that the remedy provided by the Common Law for punishment of scandalous words was, to bind the party to good behaviour, such words being a breach of the peace. It is true that the words spoken in that case were far less offensive than those complained of in the present; but the principle of the decision applies. The other case is a subsequent one of *Regina v. Nuns* (c), in which the indictment was for using threatening words to Magistrates, when the defendant was brought before them on a warrant. The judgment was arrested; and one of the grounds for arresting (as stated in *Gilbert*, p. 40), was, that the indictment did not show that the charge on which defendant was

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(a) 2 Lord Ray. 777; S. C., 7 Mod. 29; 1 Holt, 331.

(b) 2 Lord Ray. 777-78.

(c) Gil. 36; S. C., 10 Mod. 187

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brought before the Magistrates was within their jurisdiction; and, if not, that it would be no crime to speak "*in deprivation of their authority.*" There are less grounds in the present case than in that one for holding the words indictable, inasmuch as Mr. Lytle, though a Magistrate, did not even profess to be acting as such when they were spoken.

With the exception of the cases referred to, none has been cited, down to the present, which established the proposition that slanderous words of a *Mayor*, or other corporate officer, in relation to his office, are indictable, even though spoken *to him* while acting in the execution of such office. Corporations have existed for centuries; and there can be no doubt that slanderous and obscene words have frequently been spoken at the meetings of those bodies to Mayors and other corporate officers, presiding and acting as such. Precedents are found in our books of Criminal Law of indictments, in various forms, for offensive words spoken to Magistrates, as such, while acting in the duties of their office, for words tending to provoke a breach of the peace, and for words of a seditious or blasphemous character; and yet the researches of Counsel have not enabled them to refer us to any precedent of an indictment or information applicable to the present case, or to any positive decisions in favour of its validity. It is difficult to imagine that some would not have been found, if such an indictment was considered to be maintainable.

If we held that the words complained of in this case were the subject of indictment or information, on the ground that they were spoken to a Mayor acting in the execution of his office, and presiding at a meeting of the corporation, we should adopt a similar rule with respect to slanderous words spoken to the chairman or presiding officer of the various other corporate bodies referred to by my Brother FITZGERALD. Mr. *Brewster* indeed contended that a similar rule should be adopted in the case of an Alderman, or other Town-councillor, presiding at a corporate meeting—a proposition at variance with the decision in *Regina v. Rogers (a)*, already mentioned. I do not think it advisable that we should now extend

(a) 2 Lord Ray. 777.

the limits within which, according to established usage and precedent, the right of proceeding by indictment or information for slanderous words has hitherto been recognised, or that we should now create a new precedent for the purpose. The observations of Lord Denman, in the case already mentioned of *The Duke of Marlborough* (a), bear upon the question before us, though the facts of that case are different, inasmuch as the words on which the Duke's application for a criminal information was grounded (words imputing improper conduct to him as a Magistrate), were spoken of him in his absence, and not to him. The application was refused; and Lord Denman, in delivering the judgment of the Court, stated [p. 958] that they could not grant it without creating a precedent; and this they ought not to do except they felt perfectly clear that the law would warrant them in so doing. And he also stated that they were unwilling to treat mere words as affording grounds for a criminal information. In a previous part of his judgment [p. 957] he stated that the reason for interfering by criminal information when slanderous words, imputing misconduct to a Magistrate, were spoken to him while performing his duty, was, that it "*created a direct obstruction to the course of justice.*" And this appears a much better reason for the distinction which prevails with respect to Magistrates, than the reason assigned in some of the early cases, namely, that the words were an aspersion upon an officer appointed by the Crown; which latter reason would equally apply, whether the words were spoken to a Magistrate, acting as such, or were spoken in his absence.

It has been also urged that the important business to be transacted at these corporate meetings would be obstructed, if such grossly improper language as used by Mr. Rea was not to be prevented and punished, by treating it as a criminal offence. I may observe that in this case the information is not framed on the ground that the public business was obstructed; and, even if it was, I do not think it would be thereby sustainable. Mr. Rea might, for his conduct, have been excluded by the Mayor from the meeting, or bound over to keep the peace, or committed, in

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(a) 5 Q. B. 957.

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default of finding sureties; and, according to the opinion of the Court in *Regina v. Langley (a)*, "the binding of the defendant "to good behaviour would be sufficient to secure the authority of "the Mayors." If that remedy be not considered sufficient, it would be for the Legislature to make, with respect to corporate bodies, a similar provision as was contained with respect to the Courts of Revision in the Parliamentary Voters Registration Act of 1850, by the 37th section of which power is given to the Revising Barrister to punish, by a fine of £2, or fourteen days' imprisonment, any person who disturbed the Court, or was guilty of any contempt of Court.

On these several grounds, I am of opinion that the first and eleven subsequent counts of this information are not sustainable, and that the judgment should be arrested as to them.

LEFROY, C. J.

I concur with my Brethern that the last three counts are good. I differ from two of them, as to their judgment on the first twelve counts. With respect to these twelve (in which the traverser is charged with having used words tending to degrade the Mayor in his office, but without any allegation of an intention to provoke to a breach of the peace), if the argument for the petitioner be well founded, it will furnish a license for vilifying every Mayor in Ireland with impunity; but, though the argument was urged with great ingenuity, it seems to be based upon a sophism, and to be as unfounded in logic as it is in law. I need hardly refer to cases to show that, from the earliest times, a Mayor and a Magistrate have been held to be *in pari jure*. We find the most eminent Judges speaking of the protection given to Mayors as in *in pari jure* with that given to Magistrates; and even if there were no foundation for that opinion, the Municipal Corporation Act has secured to every Mayor in Ireland the same protection as a Magistrate; for that Act makes him *ipso facto* a Magistrate. It is not necessary to inquire whether this is an indictable offence, in order to show that the Municipal Corporation Act has in express terms given the Mayor the

protection necessary for the duties there imposed on him. This Court will protect him by its power to grant an information. We must see that he has the protection necessary to enable him to discharge the duties of his office. I admit, whatever charges are made must be made in the presence of the Mayor; and it was there that the offence in this case was committed. The charges must also be as to the duties of his office; and the charges in the present case have been shown to be made in relation to those duties. If the man who is determined to make an offensive charge against the Mayor in relation to one of his duties, postpones making it till he meets the Mayor in discharge of another duty of his office, is he to be allowed to make this defence—"I did not make this charge in a Municipal Court"? Does not the Mayor bear about him the responsibility of a Magistrate, and the powers of a Magistrate? Under the Act referred to, he has first imposed upon him the office of a Magistrate; secondly, the judicial function in the Registration Court. These are distinct duties, but they are all imposed upon one single person; and it would be a monstrous thing that he should be liable to be insulted in respect of one duty, when found discharging another of the duties imposed upon him by the same law.

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It is said there is no precedent of an indictment for words spoken to a Mayor. That may be, but when the Legislature has given three offices to the Mayor, is he to be divested of the protection given to a Magistrate, because he holds the other offices? It does appear to me that, if we were to yield to this argument, it would be leaving it in the power of any party, by a mere artifice, to deprive the Mayor of the protection he is entitled to by law,—and that protection is the protection of this Court.

It appears to me that all the circumstances have occurred in this case necessary to entitle the Mayor to judgment on this information. The charge was, that he had fraudulently secured his own election. That charge refers to an occasion when he was discharging one of the duties imposed on him as Mayor, by the law; and the charge was made in his presence. I, therefore, think the judgment of the Court should be in his favour.

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Common Pleas

THOMAS CLARKE LUBY

v.

His Excellency

JOHN WODEHOUSE, BARON WODEHOUSE,
 Lord Lieutenant-General and General Governor of Ireland.

(*Common Pleas.*)

Nov. 11, 13.

No action is maintainable against a Lord Lieutenant of Ireland in an Irish Court, during his continuance in office, for any act done by him *qua* Lord Lieutenant; and where such an action has been brought, the Court will, on motion, direct that the writ of summons and plaint be taken off the file, without putting the Lord Lieutenant to his plea.

The question whether the act complained of was or was not done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury.

THIS was an action at the suit of Mr. Thomas Clarke Luby, the proprietor of the *Irish People* newspaper, and then a prisoner in Richmond Bridewell on a charge of high treason, against the Lord Lieutenant of Ireland.

The writ of summons and plaint contained three counts—in trespass, trover, and detinue respectively. The first count complained that the defendant broke and entered the house of the plaintiff, situate at No. 12 Parliament-street in the city of Dublin, and continued therein without the consent of the plaintiff, and against his will, and disturbed the plaintiff in the peaceable possession thereof, and broke open the doors thereof, and the locks thereto affixed, and broke open the boxes, chests, and drawers of the plaintiff in his said house, and searched and examined the rooms in the said house, and read over, pried into, and examined all the private papers and books of the plaintiff there found, whereby the secret affairs of the said plaintiff became wrongfully discovered and made public; and took and carried away manuscripts, printed papers and pamphlets of the plaintiff. The second count complained that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods—that is to say, the working plant of an operative printer and publisher, types, books of account, ledgers, and papers of the plaintiff. And the third count complained that the defendant detained, and still detains from the plaintiff, the goods and chattels of the plaintiff—that is to say, the working plant of an operative printer and publisher, types, books of account, ledgers, and papers of the plaintiff, to the plaintiff's

damage, &c. &c. The writ of summons and plaint was dated the 28th of October 1865. The Lord Lieutenant did not appear and defend, but on the 6th of November Mr. Lawless, the plaintiff's solicitor, received the following notice:—

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"Court of Common Pleas.

"Sir,—Take notice that the Attorney-General will, upon Thursday next the 9th day of November instant, or the first opportunity afterwards, apply to the Court for an order that all proceedings in this action be forthwith stayed; and that the writ of summons and plaint may be set aside, and if filed before this motion shall be heard, shall be taken off the file; which motion will be grounded upon the said writ of summons and plaint, the affidavit of Thomas Mostyn this day filed, and the documents therein referred to (a copy of which affidavit I herewith send you), the nature of the case, and the reasons to be offered.

"Dated the 6th day of November 1865.

"THOMAS MOSTYN, Crown and Treasury Solicitor,
 "19 Merrion-square South."

The affidavit therewith sent was as follows:—"Saith that this action is brought against the Lord Lieutenant-General and General Governor of Ireland for acts alleged to have been done under authority given by him in his capacity as such Lord Lieutenant of Ireland, and that this plainly appears from an affidavit purporting to have been sworn by the said plaintiff in a cause now depending in the Court of Exchequer in Ireland, of *Luby v. Stronge*, filed the 31st day of October 1865, to which deponent craves to refer; that deponent believes it to be untrue, as stated in the said affidavit, that the acts complained of, or any of them, were done under or in obedience to any written directions, warrant, or document signed by the Lord Lieutenant or by Sir Thomas Larcom; and deponent saith he believes that no directions or authority, written or verbal, were given by the Lord Lieutenant or the said Sir Thomas Larcom in relation to the acts complained of, or any of them. And in relation to the statements in the said affidavit of the said Thomas Luby, as to the holding of a Privy Council, and the signature thereat of a warrant, and the

M. T. 1865. "alleged proceedings by the said Privy Council in relation to the
Common Pleas. "said warrant and other matters referred to in the said affidavit,
 LUBY "deponent has been informed and believes that such statements are
 v. "wholly destitute of foundation; and deponent has been informed
 WODEHOUSE "and believes that the acts complained of were done by the con-
 "stables of the Metropolitan Police Force, acting in the ordinary
 "discharge of their duty against the plaintiff, and others, on a charge
 "of high treason, for which they have since been committed for
 "trial, in respect of which said acts of the constables, actions have
 "been since brought, and are now pending, against them in the
 "said Court of Exchequer, in which said actions deponent has been
 "informed and believes the said constables are prepared to justify
 "their acts; that the said John Baron Wodehouse, who is named
 "as defendant, was duly appointed Queen's Deputy and Lord Lieu-
 "tenant of Ireland, in and by virtue of letters patent bearing date
 "the 1st day of November 1864, and that he was duly sworn in as
 "such Queen's Deputy and Lord Lieutenant of Ireland upon the
 "8th day of November 1864; and that the acts complained of are
 "acts of State, alleged to have been committed by the Lord Lieu-
 "tenant in exercise of his said office of Queen's Deputy and Lord
 "Lieutenant of Ireland."

The affidavit of Mr. Luby, in the case of *Luby v. Stronge* in the Court of Exchequer, was made for the purpose of grounding a motion for liberty to administer interrogatories to Mr. Stronge, and stated the circumstances under which the grievances there complained of were committed, at much length. This affidavit was, on the one hand, relied on by the Crown to show that the acts complained of were, on plaintiff's own showing, acts of State; and, on the other hand, it was dwelt on to show that these acts were manifestly arbitrary acts of power which could in no way be justified as constitutional and privileged. In substance it stated that No. 12 Parliament-street was occupied by him as his place of business as a newspaper publisher, though he resided at Dolphin's-barn; and that after he and his clerks had finished their day's work, the house was simply occupied by a caretaker; that on the 15th of September he left his place of business at about seven in the evening, and that

his clerks left soon after, and the house was shut up for the day; that some time afterwards the caretaker also went out, bolting the door behind him, and taking the key with him, and, while he was away, Superintendent Ryan, and other officers and police, acting under the direction and by the authority of the defendant John Calvert Stronge, broke open his house by violence, and forcibly entered, breaking every door before them, and opening drawers, &c.; that all this time there was a large body of police outside the house, and when two of his clerks, hearing what had been done, came to make inquiries, they were carried off to prison, without any warrant; that they then tore up the floors, carried off the type and other printing materials in a float, as also a number of printed papers and private papers of deponent's, his ledgers, cash-books, and other business books, and his furniture; that he was at the time at his residence in Dolphin's-barn, where he remained till many hours after said seizure, when he was arrested on a charge of treasonable practices; and he believed that no warrant against him was in existence at the time that the seizure complained of was effected; that nothing so seized had been returned to him except the furniture, which he heard had been returned to his wife; that at the time of his arrest by the police, upon what was represented by them to be a warrant from the said J. C. Stronge, his house at Dolphin's-barn was searched, and, among other papers, the lease of his house in Parliament-street and his marriage certificate were taken; that there were in his possession in Parliament-street, at the time of the seizure, private papers of his, and letters, &c., relating exclusively to his own private affairs, and in no way, directly or indirectly, connected with any political matter whatever; that he did not know whether Stronge accompanied those who made the seizure, but knew that they acted under his directions, and, he believed, under a warrant signed by him; that, in order to give colour to the seizure, informations were sworn by John Smollen and Launcelot Dawson, before Mr. Stronge and that upon those informations the defendant gave the directions for the seizure and search of the house; that in consequence of this seizure having been made when all his people were away from the house, he did not know for certain whether

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those who broke in had a warrant or not; that he himself, when brought before the Magistrates, had seen in their hands some of his things alleged to have been seized at Parliament-street; that since his confinement, bankruptcy proceedings had been threatened against him, and an action brought by persons alleging that he was in their debt, which action he was unable to meet in consequence of the detention of his books; that no bills of indictment had been found against him, but he was informed that it was the intention of the Government to institute a prosecution against him, and that the detention of his papers and documents had greatly prejudiced him in his preparations for his defence; that he had *bona fide* brought that action (against Mr. Stronge), under the advice of Counsel, for the purpose of obtaining redress, and obtaining the restoration of his property; that he was advised and believed that Mr. Stronge, in making such seizure, did not act within his jurisdiction as a Justice of the Peace, but acted ministerially in carrying out instructions given to him; that he had been informed and believed that, in the proceedings relating to the seizure of the house in Parliament-street, Mr. Stronge acted in obedience to written directions given to him in a warrant, or some similar document, signed by his Excellency the Lord Lieutenant and Sir Thomas Larcom, and perhaps by other Privy Councillors; that he was advised and believed that, by the Law and Constitution of the British Empire, any Privy Councillor advising or concurring in said illegal seizure would be liable to action or punishment at his suit.

The Court of Exchequer having, upon the foregoing affidavit, given leave to the plaintiff to exhibit interrogatories to Mr. Stronge, that gentleman denied that he had been present at the seizure in Parliament-street, or that said seizure was under his direction or authority. Pending those proceedings the present action was brought.

By a further affidavit, filed in the eve of the motion, the plaintiff, without questioning the truth of the answers to the interrogatories, or the veracity of Mr. Baron Deasy, who had stated that no meeting of the Privy Council, such as that suggested in his former affidavit, had taken place, deposed that he still believed that an informal meeting of the Privy Council had been held, and that the acts in question had

been done in pursuance of their directions or suggestion, and with their approbation; and that he hoped to be able to prove, at all events, that the acts in question were directed personally by the Lord Lieutenant, and, when done, approved of by him; and he referred to a letter published in the newspapers, in which the Lord Lieutenant, in answer to a letter of Lord Fermoy's, after alluding to the disturbed state of the country, expressed his approval of the measures which had been adopted by the Government for the suppression of the Fenian conspiracy; and he submitted that he was advised that the Lord Lieutenant, by thus adopting these acts, had rendered himself responsible for them.

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The Attorney-General (with him *F. L. Dames*).

Mr. Mostyn states, in his affidavit, that this action has been brought against the Lord Lieutenant for acts alleged to have been done under authority given by him in his capacity as such Lord Lieutenant, and that the acts complained of are acts of State. I submit that this action is not maintainable against the head of the Executive in this country, and that it is the duty of the Court, at the earliest possible moment, to interfere, and say that they will not allow this case to proceed further. The plaintiff, in his affidavit, says that he expects to be able to prove at the trial that the acts complained of were done by the direction, authority, and sanction of the defendant, and that he personally interfered in such a way as to make himself responsible in this case for those acts; but the only foundation for this statement is the letter to Lord Fermoy, referred to in the affidavit. This very letter, however, by speaking of steps having been taken by the Government to repress seditious movements in Dublin and Cork, shows that whatever steps were taken by the Lord Lieutenant in this matter were taken by him in his official character, and as acts of State. A subject of the realm cannot bring an action against the Queen, or head of the Executive Government, for any acts done by the Queen or the Executive Government, as acts of State, but must seek a remedy elsewhere: see *Mostyn v. Fabrigas* (a). Lord Mansfield, in

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(a) Cowp. 161.

M. T. 1865. the course of his judgment (a), says:—"It is truly said that a Govern-
Common Pleas "nor is in the nature of a Viceroy; and therefore, *locally, during his*
LUBY "government, no civil or criminal action will lie against him. The
v. "reason is, because upon process he would be liable to imprison-
WODEHOUSE "ment." Now, the Lord Lieutenant of Ireland is a Viceroy; and
to hold that he could be sued for his acts of government would be in
direct opposition to the opinion of Lord Mansfield. It would, be-
sides, paralyse all government; every felon who might think that
he was improperly arrested might sue the Lord Lieutenant for his
arrest; every notorious offender, for whose apprehension the Lord
Lieutenant might issue a proclamation offering a reward, might
bring his action of libel. Why, it may however be asked—why
stay the proceedings? Why not put the Lord Lieutenant to his
plea? The answer is, that it would involve all the mischiefs which
it was the intention of the Constitution to guard against, if the Lord
Lieutenant were obliged to come here to set out his letters patent,
and to plead his privilege, and, if it were to be left to a jury
to decide the extent and nature of that privilege. This present
case, though novel, is not without a precedent. In 1792, Mr. Nap-
per Tandy brought an action against Lord Westmoreland, the then
Lord Lieutenant of Ireland—another against the then Attorney-
General—another against the then Speaker of the Irish House of
Commons, for the alleged violation of his liberties, by the publi-
cation of a certain proclamation: see *Tandy v. Earl of Westmore-*
land (b), reported by Mr. (afterwards Sir) Jonas Green, the then
Recorder of Dublin. An application was made at the Plea side
of the Exchequer, to set aside the writ of subpœna which had been
served at the suit of Napper Tandy against the Lord Lieutenant.
There was a good deal of controversy as to whether the act com-
plained of was or was not an act of State. The Court however came
to the conclusion that it was, and set aside the writ, on the ground
that, if such actions were allowed to proceed, the law of the land
would become a dead letter. The Court however abstained from
giving any opinion as to whether or not the head of the Executive
was liable for any acts of a private nature; and therefore the case of

(a) Page 172.

(b) 27 State Trials, 1246.

Hill v. Bigge (a), in which the Privy Council decided that the defendant, who was the Governor of a province, was *not* exempted from being sued upon a private bond, is clearly distinguishable from it. In the case of *Buron v. Denman* (b) an action was brought against a naval commander, for seizing certain slaves, for breaking into a factory, burning certain ships, and taking away the slaves. The defendant had no instructions from Government at the time that he did the acts alleged, but the acts were subsequently approved of by the Secretary of State. The action was brought in the Court of Exchequer, and was tried at bar. The question was raised, whether the subsequent approval of the Government rendered the acts complained of acts of State; and the three Barons of the Exchequer held that it did, and that the defence was a good one. Chief Baron Parke did not dissent. The cases of *De Haber v. The Queen of Portugal*, and *Wadsworth v. The Queen of Spain* (c), show that it is not proper to force an appearance to plead before granting relief. The case of *Viveash v. Becker* (d) is not in point here. That case simply decides that a consul is not a public officer entitled to privilege. In *Calder v. Halket* (e), which refers to *Taaffe v. Downs* (f), it was held that a Judge is privileged, who outsteps his privilege while acting *bona fide* in his capacity of Judge.—[MONAHAN, C. J. Did not the defendant in this case plead his privilege?—Yes.

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Butt (with him *Dowse* and *O'Loghlen*), for the plaintiff.

There are only two grounds upon which this motion can be maintained—either that the Lord Lieutenant, by virtue of his capacity of Viceroy, is exempt from the jurisdiction of this Court, or that, admitting him to be generally amenable to the jurisdiction of the Court, yet that, for what was called an act of State he was not liable to be sued.—(Having stated the substance of Luby's affidavits).—The action here brought against the Lord Lieutenant is clearly for an act of power, and not an act of State; and therefore

(a) 3 M. P., C. C. 465.

(b) 2 Exch. 167.

(c) 20 L. J., N. S., Q. B. 488-9.

(d) 3 M. & S. 284.

(e) 3 M. P., C. C. 28.

(f) Hatchell's Report.

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the case of *Tandy v. Westmoreland* is not merely not an authority against us, but is actually in our favour. This appears from the nature of the acts themselves. The writ of summons and plaint in the present case was copied from the declaration in the case of *Entick v. Carrington* (a). In that case, the plaintiff declared that the defendant broke and entered his dwelling-house, and carried away his papers, under a warrant from the Earl of Halifax and from the Privy Councillors of State, who suspected the plaintiff of being the publisher of a seditious libel. Lord Camden, in delivering the judgment of the Court, said that the power claimed for the Secretary of State, of seizing all the private papers of the plaintiff before he was convicted of writing or publishing the seditious libel, was not supported by a single citation from any law book; and that, if that doctrine could be maintained, England was not the place in which any man of spirit or honour would desire to live. Mr. Luby has applied for his private papers, and been refused. His Counsel applied at the police-office for liberty to look at them, and was refused. We do not question the doctrine, that if a man was arrested under a warrant, the officer may, at the same time, seize anything which he thought relevant to the charge, or that, in time of rebellion documents might be seized, as being instruments of treason, and that seizure afterwards justified, by proving that they were so. This is not the present case. The plaintiff has sworn that he believed that he would be able to prove that the Lord Lieutenant took part in the acts complained of, in such a way as to make him responsible in law. Supposing the Lord Lieutenant, without any authority from the Privy Council, or any information, was to direct a body of police to do an illegal act, could it be said that it was an act of State, without allowing the question to be tried in the ordinary way? It is a well-established maxim of law, that there is no wrong without a remedy. If the *Attorney-General* be right in his view of the law, where then would be the remedy? Even the Queen is not exempted from being sued: the petition of right is the remedy against her; but the law as to petitions of right is not extended to acts of trespass com-

(a) 19 State Trials, 1030; S. C., 2 Wilson, 275,

mitted by the Queen's servants. Upon the principle that the Queen can do no wrong, she could not be held to have authorised the trespass; and thus a principle has grown up which has become the great protection of our liberty, for it means that the royal authority shall never be pleaded as a defence for a wrongful act; but that principle cannot by any contorsion, be held to justify a *Lord Lieutenant* in his wrong. When *Tandy v. Westmoreland* was decided, before the Union, Ireland was a separate and independent kingdom, and the Viceroy directly represented the Crown. Now there is no kingdom of Ireland. So far therefore as that case appears to be an authority for the present motion, the case, as reported, loses its force; but, even if that were not so, its authority is put an end to by the case of *Hill v. Bigge (a)* in which it is stated that no reliance can be placed upon the report of *Napper Tandy's case*, in which *dicta* were ascribed to the Court, in which it was impossible to concur. If, again, the case of *Fabrigas v. Mostyn* be good law, Irishmen have no remedy in their own Courts for acts such as the present; but they must go to England for redress. There have been, within the last twenty years, two cases in which the Lord Lieutenant of Ireland was sued—one being *Birch v. Lord Clarendon*, where the Lord Lieutenant paid the money.—[MONAHAN, C. J. I was the Attorney-General of the day at the time that Birch brought the action; but, as Lord Clarendon did not consider it a matter of State at all, the Attorney-General had nothing to do with it; and my recollection is, that it never went to trial.]—The declaration was filed, and Lord Clarendon paid £7000 rather than contest the action.—[MONAHAN, C. J. If we come to the conclusion that an action could be maintained against the Lord Lieutenant, the question is, can we determine upon affidavit whether it is an act of State or not?—I contend that, upon that view, you must put the Lord Lieutenant to his plea of privilege. The case can be then solemnly discussed, like every other important question of law, whereas, if you grant the present motion, there is no appeal.—[MONAHAN, C. J. What do you consider the distinction, in a case of this description, between an *act of power*

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and an *an act of State* ?]—The phrase is not mine ; but in *Napper Tandy's case*, where it is used, there was a gentleman, named Butler, who took it into his head that there was no legal Government of Ireland. The Lord Lieutenant, he said, was nominated under the Great Seal of England ; and the King could not grant anything save under the Great Seal of Ireland ; and the Lord Lieutenant having been appointed only under the Great Seal of England, there was no legal Government. This was pretty much the same as if I went into the Queen's Bench on behalf of the Fenian Republic, and moved for a *quo warranto* to know why the Lord Lieutenant exercised his power. I would rather put it, that the present action is brought against Lord Wodehouse in *his personal capacity*, and not for an act of State.—[MONAHAN, C. J. The difficulty that I feel is, to make out how this act is represented as *not an act of State*.]—If the Court has any jurisdiction at all in a case against the Lord Lieutenant, it has a right to call on the Lord Lieutenant to say why he did the acts. If his answer then should be, "I did them as acts of State," that would not oust the jurisdiction of the Court to try whether they were acts of State or not.—[KROGH, J. The practical result would be, to submit to the arbitrament of a jury every act of the Executive in this country.]—I do not see that that would involve serious consequences. The difference between the Queen and a Viceroy is this, the Queen is, by a fiction of law, supposed never personally to interfere. Thus she could do no wrong ; and if, therefore, an illegal act was done, the Constitution supposed that it was not the act of the Queen, but of the minister who advised her ; and no man would obey the order of the Queen unless it were counter-signed by a responsible minister. Men *would* obey the order of the Lord Lieutenant, without its being counter-signed by any responsible minister. The Queen reigns, but does not govern ; the Viceroy may govern, but cannot reign. The Prime Minister of England, and the Secretary of State for the Home Department, are more important functionaries than the Lord Lieutenant ; yet every act of those ministers may be submitted to a jury. When Chief Justice Downes was sued for an act, *he* did not seek

to set the proceedings aside, but pleaded that he did the act as Chief Justice. Either the Court must hold itself bound to regard every act as an act of State, in which the Lord Lieutenant professed to act as Lord Lieutenant—and that upon his *ipse dixit*,—or else the question, whether it is such or not, must be submitted to a jury. Even Lord Avonmore does not deny that an action would be maintainable for what he calls “an act of power.” And since the Union, now that the Viceroy does not directly represent the Crown, and the Privy Council has no authority save what is given to it by statute, the argument in favour of the subject is still stronger. The Judges of this Court sit here under a commission from the Queen, and not from the Lord Lieutenant; and they can, in no view of the case, grant the motion, without holding that the acts complained of necessarily involve an act of State. At the best, Napper Tandy’s case is doubtful law. It was decided at a time of rebellion, when even Courts of Justice were not exempt from surrounding influences, as appears from the fact that, in the very next year, the Court of King’s Bench committed the High Sheriff of the county of Dublin to prison, and fined him £500, for calling a meeting of freeholders to petition for reform. The report, too, is without authority, and has been pronounced incorrect by the Privy Council, in *Hill v. Bigge* (a).

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The *Attorney-General* has no *locus standi* here. For whom does he appear? Is Lord Wodehouse before the Court, by Counsel or relator, or does the *Attorney-General* make this motion *ex officio*? The *Attorney-General* is Her Majesty’s *Attorney-General*, and not the Lord Lieutenant’s; he cannot therefore be presumed to appear for him. If he does not appear for the Lord Lieutenant, *Napper Tandy’s case* is not applicable at all, because in that case the *Attorney-General* appeared for the Earl of Westmoreland, and not *ex officio*. Mr. *Mostyn*, too, is solicitor for the Crown and Treasury, and is not the Lord Lieutenant’s solicitor. This is an interlocutory application, and is subject to no appeal. It is conceded that the Lord

(a) 3 M. P., C. C. 480.

M. T. 1865. Lieutenant would be liable in an action for assault, and the case of *Hill v. Bigge* decides that he would be also liable for a private debt; the *onus* of proof is therefore upon him, and he must come into Court to show that the acts complained of were really acts of State. The observation of Lord Brougham, in the case just mentioned, shows that *Napper Tandy's case* is incorrectly reported; and the fact that it does not appear in the regular *Exchequer Reports* strengthens the presumption; for, if it were an authority worth reporting, it would be there. Perhaps the society of United Irishmen, who were the Fenians of those days, and admittedly had a hand in the report, prepared the report, in order to bring the Lord Lieutenant into contempt. The case of *Entick v. Carrington* (a), already cited, supports the view for which we contend; while the case of *Canterbury v. Attorney-General* (b) shows that we have no remedy by petition of right. The privilege of Ambassadors is given by 7 Anne, c. 12, but that Act does not extend to Viceroy.

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The *Solicitor-General*, in reply.

We do not state that the prerogative of the Viceroy of Ireland is the prerogative of the Crown; what we do say is, that in no civilised country can the Executive be sued for acts done in that capacity. In the case of *Taaffe v. Lord Downes* (c), Fletcher, J., rests the privilege of a Judge upon this ground; the privilege of an Ambassador stands upon the same footing. The history of the statute 7 Anne, c. 12, is given in *Viveash v. Becker* (d), and shows that the Act did not create, but simply declared the existing law. The case of *Entick v. Carrington* is not in point, but turned upon the doctrine of general warrants. With reference to the observations of Mr. Butt upon the circumstances of the seizure, see "*The Trial Francis Francia*" (e), where Tracy and Pratt, JJ., commented upon a similar course taken by Mr. Hungerford.—[Butt. Allow me to suggest an error in fact, made by my learned friend. In the affidavit it is stated that there was no warrant in existence

(a) 2 Wilson, 275.

(b) 1 Phillips, 306.

(c) 3 M. P., C. C. 36.

(d) 3 M. & S. 284.

(e) 15 State Trials, 966.

at the time that the seizure was made; and that statement not having been denied, must be assumed to be true.]—No such presumption can be made.—[CHRISTIAN, J. Am I to understand that you admit that the Lord Lieutenant can be sued in this Court under any circumstances?—Yes; I do admit that he could be sued for every personal wrong, and every personal debt. In *Briscoe v. Earl of Egremont* (a), and in *Rae v. Nagle* (b), the relief that we ask for was granted *upon motion*. As to whether an action lies or not, see *Wadsworth v. The Queen of Spain*, and *De Haber v. The Queen of Portugal*. There is no real difference between the position of the Lord Lieutenant before or since the Union, so far as the extent of the powers given to him is concerned.—[MONAHAN, C. J. I have looked at the patent, and find that his powers are very large indeed.]

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Cur. adv. vult.

MONAHAN, C. J., on this day delivered the judgment of the Court.

Nov. 13.

In this case of Luby against His Excellency the Lord Lieutenant an action has been commenced by the plaintiff Mr. Luby against the Lord Lieutenant, which is in the ordinary form of trespass. He alleges that the defendant, on the evening of the 15th of September last, broke and entered his dwelling-house, situate in Parliament-street in the city of Dublin, and took away a quantity of private property, consisting of papers and other articles, and has since retained them. This is virtually the substance of the summons and plaint. The plaintiff has made an affidavit in an action which he brought in the Court of Exchequer, and in which Mr. Stronge, one of the Police Magistrates, is the defendant, in which he states in detail what the cause of action is, and the grounds on which he hopes to render Mr. Stronge and the Lord Lieutenant responsible for the acts of which he complains. He states in that affidavit that he himself was, on the morning of the 16th of September (which was the day after this alleged trespass of which he complains was committed at his house in Parliament-street), arrested at his house in Dolphin's-barn, for alleged treasonable practices, and that he has

(a) 3 M. & S. 88.

(b) 9 Ir. Jur., N. S. 81.

M. T. 1865 been since kept in custody. He says that he has been informed and
C *ommon Pleas* believes that the subject-matter of the complaint which he has
LUBY against those parties is, that on the evening of the 15th of Sep-
v. tember, when he left his office in Parliament-street, the Police
WODEHOUSE Magistrate, with a body of police, under an inspector, proceeded to
 his house in Parliament-street. He says that he had been under
 the impression that what was done there was done in the presence of
 Mr. Stronge. He now corrects that statement, and says that he
 must believe that Mr. Stronge was not a party to the outrage
 committed at his residence. He says that they took a great
 quantity of private papers, printing presses, and matters connected
 with the publication of his newspaper; and he also says that these
 papers were taken, and have since been detained in a room in the
 Castle of Dublin; that they have been inspected by various persons;
 that some of the papers so taken have been used against him in
 reference to his committal for trial on a charge of having been
 concerned in treasonable practices. He says that a great number of
 these papers were of a private character, and were wholly uncon-
 nected with treasonable practices, and that it was in order to get a
 return of these papers that he commenced the present action. In
 the first affidavit made by him in the Court of Exchequer, he stated
 the ground on which he hopes to succeed in these actions; he
 states in this affidavit, that the grounds upon which he ex-
 pected to identify His Excellency with the alleged trespass are,
 that he has been informed, and believes that it was a matter of per-
 fect notoriety, published in all the newspapers, that, on the evening
 of the day on which the trespass was committed, a meeting of the
 Privy Council was held at the Castle of Dublin, and at which His
 Excellency the Lord Lieutenant presided; that a number of mem-
 bers of the Privy Council were present, and that they came to the
 determination that a warrant for the seizure of his goods should be
 issued; and, in pursuance of that resolution, a warrant was issued;
 and that resolution, he alleges, was illegal, and the Lord Lieu-
 tenant, and every one who was a party to this proceeding, are
 responsible for the acts complained of; and, accordingly, such were
 the grounds of his action originally against Mr. Stronge, the Police

Magistrate. It appears that, in the action brought against Mr. Stronge, the grounds there stated are those on which he alleges he has cause of action against all the parties. It appears, from the affidavit of Mr. Luby, in the same motion in the Court of Exchequer, in which he made reference to the meeting of the Privy Council that Mr. Baron Deasy, whose name was given as that of one of the members of the Privy Council who was present on the occasion of the alleged meeting, said in Court that the matter about the meeting of the Privy Council was all a mistake, or a fabrication, from beginning to end; that there was no meeting of the Council as alleged, and that there was no consideration or discussion as to the propriety of taking any proceedings against Mr. Luby, or the other persons charged, and that there was no foundation for the statement whatsoever. Accordingly, in the affidavit which he made for the present motion, Mr. Luby states that, in deference, and giving full credence to the statement by Mr. Baron Deasy, he is now of opinion that what he stated in the former affidavit, in reference to the Privy Council, was owing to mistake. He states that he believes there was no formal meeting of the Privy Council; but that he believes something in the nature of an informal meeting, of the character mentioned in his affidavit, took place, and that the members of the Privy Council assembled there, not as the Privy Council, but still assembled; and that the act in question was done in pursuance of their directions or suggestion, and with their approbation. He further goes on to say, in that affidavit, which is evidently the production of a gentleman having a knowledge of legal phrases, that he hopes to be able to prove that the act complained of was at all events directed personally by the Lord Lieutenant, and when done, approved of by him; and he refers to a letter published in the newspapers, in which the Lord Lieutenant, in answer to a letter of Lord Fermoy, stating that the country was in a disturbed state in consequence of the Fenian conspiracy, gave his approbation to the acts of the Government for the suppression of that conspiracy. Therefore, he says, it is evident from this—and the inference he draws is tolerably correct—that, whether the Lord Lieutenant was personally a party to the proceedings or not, the Lord Lieutenant

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M. T. 1865. *Common Pleas.* has expressed his approval of those proceedings, having described them as acts of the Government that deserve the approbation of Lord Fermoy, and others interested in the welfare of the country.

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WODEHOUSE Upon that it is that Mr. Luby says he is advised by eminent Counsel that he is entitled to maintain an action against the Lord Lieutenant. The first question is altogether as to a matter of fact—namely, what is the nature of the act of the Lord Lieutenant which is complained of by Mr. Luby? We have not to enter into any contradictions at all on this point, because there is no contradiction. Taking the act, and the nature of the act, from the suggestions contained in Mr. Luby's two affidavits, and from nothing but those two affidavits, the act complained of is, that the Lord Lieutenant, for the purpose, wrongfully or rightfully, of putting an end to or suppressing this conspiracy, directed the seizure of the property of this gentleman in Parliament-street. Mr. Luby, by his affidavit, seems to admit that, as far as papers were taken, that would be evidence of the existence of this conspiracy, and would be used as evidence against himself. That is uncomplained of; but the act complained of is the taking of his marriage certificate, the taking of papers unconnected with this alleged conspiracy, and also, as I understand, the rooting up of the boards of the house in which these papers were seized, and various acts of that description. The Court entertains no doubt whatsoever that, according to Mr. Luby's own showing, and upon his own statement, it was an act done by the Lord Lieutenant, whether rightfully or wrongfully, formally or informally, *quâ* Lord Lieutenant, as much as if the same act, if it were the act of Mr. Stronge, the Police Magistrate, would be an act of Mr. Stronge in his character or capacity of Police Magistrate, and not an act of his as a private individual. Therefore, be it right or be it wrong, the act complained of here, which Mr. Luby is advised he is entitled to redress for against the Lord Lieutenant, is an act done by him, as Lord Lieutenant, in the supposed discharge of his duty. These being the facts of the case, clearly established, according to the opinion of the Court, upon the sworn evidence of Mr. Luby himself, the next question that arises is, what is the law in relation to this act? The question

is, whether in this country, where His Excellency discharges the high duty of Lord Lieutenant of the country under the Queen's commission, if he outsteps his duty, and does an act which may not be strictly justifiable (because we may assume that, for argument sake)—if he does an act which, if done by a Police Magistrate under a warrant, would not be justifiable in point of law, an action can be maintained against him pending the discharge of the duties of his very elevated office. Well, that of course, like every other question that comes before a Court of Justice, must depend a great deal on authority; it must depend also, in some degree, upon the nature of the thing—the reason applicable to it. I propose to consider this question very shortly indeed. First, as to authority, the case to which we have been referred is that of *Mostyn v. Fabrigas* (a). In that case, an action was brought in the Court of Common Pleas in England by Mr. Fabrigas, the plaintiff, against Mr. Mostyn, the defendant, who had been Governor of Minorca. The charge against the defendant was, that, without having had sufficient cause, he, as such Governor, had imprisoned the plaintiff Fabrigas, and afterwards sent him to Carthagenia in Spain; for which it was alleged that Mr. Mostyn had no authority. The question that arose in the case, and the only question that was argued, was, whether that particular action lay? And the reasons given for the judgment are deserving of great consideration, from the well-known ability and great judicial experience of the learned Judge who presided in the Court, namely, Lord Mansfield. The grounds upon which Lord Mansfield decided that that action lay in England were, that he considered it to be perfectly clear that no action could be maintained in any country, according to the law of nations—and I think he also made use of the words “law of nature,”—for any act of the party who represented the sovereign power of that country. He lays it down, at page 172 of the report—I will not stop to read the precise words—as perfectly clear, that no such action as was then being tried in the Court of Queen's Bench could have been maintained in any Court in the country in which the party was himself the Governor, the act complained of being

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the act of the party as such Governor in that country. It is quite true that in that case Lord Mansfield goes further, and states that, in his opinion, no action at all, even of a civil nature, could properly be maintained against the Governor or Viceroy of a country where he was Governor, and while he was in the performance of his official functions.

The next case we were referred to, and that we are aware of, on the subject, is that of *Napper Tandy v. Lord Westmoreland*, reported in the 27th vol. of the *State Trials*. In that case, an action was commenced in the Court of Exchequer by Napper Tandy against Lord Westmoreland, the then Lord Lieutenant of Ireland. There was this difficulty in that case, that no declaration had been filed; and we are all aware that at that time a suit commenced, not as it does at present, but by a mere writ in general terms requiring the party to appear and answer what should be complained of against him; so that there was nothing on the face of the proceedings themselves to show the nature of the action against Lord Westmoreland. The Attorney-General of the day came in to quash the proceedings; and he was able to satisfy the Court that, in point of fact, the intended action, in which no declaration had been filed, was brought against Lord Westmoreland for issuing some proclamation for the arrest of Napper Tandy, in pursuance of some address presented to him by both Houses of Parliament. It is unnecessary for me to go into the grounds upon which the Court in that case came to the conclusion at which they arrived. The Court came to the conclusion that the action was brought for an act done by Lord Westmoreland *quâ* Lord Lieutenant, and not for a personal act done by him as a private individual. The Court of Exchequer was at that time, namely, 1792, presided over by a very eminent Judge—a man alike respected by his contemporaries and by posterity,—I mean Lord Avonmore. The result of his decision was, that this action, being for an act done by the defendant as Lord Lieutenant, could not be maintained, and that he was bound in duty to set aside the writ which was issued for the commencement of such action. He says:—
 “I have said that this is not a question merely of the Municipal

"Law of Ireland or England, but of the Law of Nations; and M. T. 1865.
 "to show that it is, look to *Puffendorf, de Officio Hominis et* *Common Pleas.*
Civis, treating not of the law of this state or that, but of the *LUBY*
 "Law of Nations." He says:—"If a subject be aggrieved by *v.*
 "a Sovereign, he cannot maintain an action, or oblige him to *WODEHOUSE*
 "redress; he may persuade him if he can." He also refers to
 a passage in *Locke's Essays on Government*. I do not think it
 necessary that I should go through the whole of the reasoning
 which satisfied him and the other Members of the Court, that
 the action about being brought by Napper Tandy should, at the
 earliest moment, be stayed, and the proceedings set aside. There
 was another case referred to, and which appears to have been
 reported at very considerable length—I mean the case of *Hill v.*
Bigge (a). That was an action brought for the recovery of the
 amount of a bond executed by the defendant, Sir George Hill,
 before he was appointed Governor of Trinidad. The plaintiffs were
 eminent jewellers in the city of London, and the bond was executed
 to them before the defendant went to Trinidad. The Court which
 heard the appeal in that case was a very able one; it consisted
 of Lords Brougham and Campbell, Mr. Justice Erskine, and
 Dr. Lushington. The way the question arose was this:—the de-
 fendant, Sir George Hill, having executed this bond, an action
 was commenced against him in the local Court of Trinidad. He
 pleaded that, being Governor of the country, under the commission
 of the Queen, he was not liable to be sued for a debt due by him in
 England, prior to his appointment. The Court of Trinidad was of a
 different opinion; and they came to the conclusion that he was liable
 to be sued, and gave judgment on a decree against him for the
 amount of the bond. He appealed to the Judicial Committee of the
 Privy Council in England; and the case was argued at considerable
 length. Counsel for the Governor, Sir George Hill, argued that no
 action of any nature, even for a debt contracted in England, could
 be brought against the Governor; and, in support of this view, they
 referred to the two cases to which I have referred—*Fabrigas v.*
Mostyn, and *Tandy v. Lord Westmoreland*, in this country, as

(a) 3 M. P., C. C. 465.

M. T. 1865. reported in the *State Trials*. They relied upon some *dicta* of Lord Mansfield in the one case, and of Lord Avonmore in the other, to show that those learned Judges were of opinion that no action at all could be maintained, whether the action were brought for an act of the Governor, as such, or not. Well, I confess it appears to me that there seems to be great difficulty in coming to the conclusion that that was the opinion of Lord Avonmore, because Lord Avonmore's judgment in that case goes altogether upon the ground that the intended action was for what he calls an act of State, and not a mere private act; and therefore I cannot see how the case of *Tandy v. Lord Westmoreland* could well have been relied on as an authority in support of the appeal in that case. Let us first see how the case was argued by the Counsel for the plaintiff. The Counsel for the defendant, Sir George Hill, having relied upon *Napper Tandy's case* in support of their contention that the Governor was not liable in any action, Mr. Erle (who is now Chief Justice) disposed of that argument thus:—
 “In *Tandy v. The Earl of Westmoreland* the act complained of “was a political act; and for such the Governor or Viceroy would “not be liable, any more than a Judge for a judicial act: but that “is not this case; the question here is, whether the appellant can “screen himself against an action on a bond on the plea that he “is Governor of the colony in which the action is brought.” That was the argument of the respondent, in which a marked distinction was taken between those two cases, while the propriety of the decision in *Tandy v. The Earl of Westmoreland* was not questioned. Well, how did Lord Brougham dispose of the case? He said:—
 “It is unnecessary to say anything of *Tandy v. Lord Westmoreland*, because the question there arose upon an act of the “Lord Lieutenant in his capacity as Governor, and because there “would be no safety in relying upon the report of the case. It “ascribes *dicta* to the Court, which there is every reason to suppose “must be inaccurately reported—*dicta*, in some of which it is impossible to concur.” He takes the distinction, however, that the case of *Tandy v. Lord Westmoreland* had no bearing upon the case before him, because it was an action for an act done by the party *quâ* Lord Lieutenant. We all know that these *State Trials* are

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sometimes not considered of the same authority as other authorised and corrected reports; and some doubt was suggested by Lord Brougham in that case, as to the accuracy of the report of the case of *Tandy v. Earl of Westmoreland*. We therefore thought it satisfactory to obtain from the office of the Court of Exchequer the orders actually pronounced in that case, and I now have them before me.—[His Lordship then read the following:—"26th of June 1792. *James Napper Tandy, Esq., v. The Earl of Westmoreland*.—Mr. Attorney-General, for his Excellency the Lord Lieutenant of Ireland, the defendant in this cause, moves to prohibit the issuing of any attachment against him, and to quash the subpoena which issued in this case. Whereupon it is ordered by the Court, that Mr. Matthew Dowling, the plaintiff's attorney, do attend this Court at the sitting thereof to-morrow, and that no process do issue against the defendant in the meantime.

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"27th of June 1792. *Same v. Same*.—Mr. Dowling, the plaintiff's attorney, having attended the Court, pursuant to the order of yesterday, to be personally examined, and the Hon. Simon Butler, of Counsel for plaintiff, having objected to said Dowling being asked any question by the Court, this motion to stand over until next Term, everything to remain as it is."

"24th November 1792. *Same v. Same*.—This motion called on. The Honourable Simon Butler prays that this motion do stand over till Monday 26th November 1792.—*Same v. Same*.—This motion called; whereupon, and Mr. Emmett, of Counsel for the plaintiff, and Mr. Prime Serjeant, and the Solicitor-General, for the defendant, it is ordered by the Court that this motion do stand over until Wednesday next."

"28th November 1792. *Same v. Same*.—This motion called on; whereupon it is ordered by the Court that the subpoena which issued in this cause be quashed, the same being issued improvidently."]

So that whatever exaggeration there may be as to some of the *dicta* of the Judges in the case, as reported in the *State Trials*, there can be no doubt whatever that the case is accurately reported, as regards the point decided by the Court. Well, the point decided by the Court in this case was this—that, if an action be brought against

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the Lord Lieutenant of the day, for an act done by him in his capacity of Lord Lieutenant (and there is no pretence for saying that the acts were done here in his individual capacity as contradistinguished from his capacity of Lord Lieutenant), such an action is not maintainable; and the case is one in which it is the duty of the Court to intervene, by summary motion, to take the proceedings off the file. Therefore, in that state of the law, what course shall the Court take on this motion? Shall they comply with the motion which has been made by the *Attorney-General*? or shall they refuse that motion, leaving it to His Excellency the Lord Lieutenant to put a plea on the file, that the act was done by him in his capacity of Lord Lieutenant, and that therefore he is not amenable to this, or to any other Court, for such an act? Well, none of us entertain any doubt whatever as to the propriety of that decision; we entertain no doubt whatever that it would be contrary to the principles of all law, and contrary to reason, to hold that, while the Governor of a country is discharging the high duty that he is entrusted with by the Crown, even though there may be private wrong, that can be redressed by an action such as this. We have not found a trace of a single case in which such an action has been maintained, or brought at all, except that one case of *Napper Tandy v. Lord Westmoreland*. We find that, from that up to the present, though this country has passed through troubled times, no such action has been brought, or attempted, until this. We are of opinion that the reason of the rule, assuming the rule of the law to be founded on reason, requires the matter to be summarily disposed of, and that the question as to whether or not the act was done by the alleged defendant in his capacity of Lord Lieutenant, is not a proper one to be submitted to a jury. We are clearly of opinion, not upon contradictory affidavits or statements, *pro* or *con.*, but upon the plaintiff's own showing, and his own affidavits, that this act complained of is an act coming within that rule, of the propriety of which we have not any doubt; and therefore we have come to the conclusion that it is our duty to comply with the application of the *Attorney-General*. Therefore, let the proceedings be stayed, or the writ taken off the file.

Motion granted.

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TUTE v. MATTHEW and another.*

Jan. 28.
T. T. 1866.
May 24,
June 11.

DEMURRER.—The writ of summons and plaint was at the suit of Mr. John Tute, of Belturbet, in the county of Cavan, against William Hewitson Matthew, sub-inspector of constabulary, and Michael Murphy, constable, both of the same place, and complained that the defendants, intending to injure the plaintiff in his good name, and to cause his dwelling to be searched for illicit whiskey, the defendant, W. H. Matthew, maliciously, and without probable cause, caused and procured the other defendant, Michael Murphy, to wit, on the 15th day of January 1864, at Belturbet, in the county of Cavan, to go and appear before one Michael Phillips, Esq., a Justice of the Peace for the county of Cavan, and falsely and maliciously, and without reasonable or probable cause whatsoever, to swear an information, and therein to charge and state that he the said Michael Murphy had received information, and that, from such information, he had occasion to believe that a quantity of illicit spirits was concealed in the premises occupied by the plaintiff; and the plaintiff avers that the said Michael Murphy did go before the said Michael Phillips, Esq., the Justice of the Peace aforesaid, and falsely and maliciously, and without reasonable or probable cause whatsoever, did swear an information before the said Justice, and stated therein that he had occasion to believe, from information that he had received, that a quantity of illicit spirits was concealed on the premises of the said John Tute, of Strahegland, in the county of Cavan. And upon such charge the defendants, then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said Michael Phillips,

The 17th section of the 1 & 2 W. 4, c. 55, does not justify an excise officer in forcibly entering and searching a house where illicit whiskey is suspected to be concealed, but has reference only to cases where whiskey in the process of manufacture, or the materials or appliances of the process are supposed to be concealed.

The search-warrant issued under the authority of this section should be directed to the officer who has made the information.

A constable who, without malice, aids or assists in such forcible entry is entitled to a month's notice of action.

Since the passing of the Common Law Procedure Act 1853, actions against the Excise are transitory,

though the statute localising the venue is not expressly referred to in it.

Quære—Should the plea of justification set out the grounds of suspicion which lead to the making of the information upon which the warrant had been issued?

* *Coram* MONAHAN, C. J., CHRISTIAN and O'HAGAN, JJ.

H. T. 1866. Esq., Justice as aforesaid, to make and grant his warrant under
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And in a second paragraph the plaintiff complained that the defendants broke and entered a messuage and dwelling-house of the said plaintiff, and forced open the doors, and severed, and removed, and opened certain boxes, drawers, books, and fixtures therein, the plaintiff's family being then in the possession of the said house; and other wrongs to the plaintiff did, to the damage of the plaintiff of £300.

The defendants pleaded separately. After traversing the grievances and the want of probable cause alleged in the first count, and the trespass alleged in the second, the defendant W. H. Matthew, in his fourth defence, pleaded, as a further defence to the said second count of the writ of summons and plaint, that, at the time of the committing of the grievances in the said second count mentioned, he was, and still is, a sub-inspector of constabulary in Ireland, duly appointed, and acting as such, under the Acts in force for

governing and regulating the police force in Ireland, and was at the said time acting as such sub-inspector in the town of Belturbet, in the county of Cavan; and he saith that, by certain statutes in Ireland, certain powers and privileges were conferred upon officers of excise, for the prevention and suppression of offences against the laws relating to illicit distillation in Ireland; and by certain other Acts, the powers and privileges so conferred upon the said officers of excise were transferable to the county inspector, sub-inspector, head, or other constable, in any county in Ireland, employed and acting in aid and assistance of the Revenue in Ireland, upon and by force of the order of the Lord Lieutenant of Ireland, for the time being, and by force of the statutes in that case made and provided; and this defendant saith that, being such inspector of constabulary, stationed at Belturbet aforesaid, and so employed in the Revenue of Excise, under the order of said Lord Lieutenant, and having the powers and privileges in said first-mentioned statutes referred to duly and by said authority conferred upon and vested in him, he, from certain information which came to defendant's knowledge, had reasonable and probable cause to suspect and believe, and from such information did in fact believe, that certain illicit spirits were concealed in the dwelling-house of the plaintiff, situate at Strahegland, in the town of Belturbet, in the county of Cavan; and he defendant, so believing, did, by virtue and force of the statute in that behalf, cause the information in said first count of the plaint to be made before the said Michael Phillips in plaint named, he being at the time a Justice of the Peace for said county of Cavan, and duly qualified in that behalf; upon which the said Justice made his warrant, as in said first count of the plaint mentioned, directed to the said John M'Curdy, head constable of police, authorising and empowering the said John M'Curdy to enter into and upon the dwelling-house and premises of the plaintiff, there to search for illicit spirits; and defendant saith that, by virtue of the said warrant, the said John M'Curdy, as such head constable, with defendant and certain constables of constabulary, as his assistants, and under his command, and as such officers of excise as aforesaid, did proceed to, and did

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H. T. 1866. enter into and upon the said dwelling-house and premises of plaintiff,
Common Pleas. the outer door whereof was then open, to search for said alleged concealed illicit spirits, and did make search therein therefor, but using
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5. And, as a fifth defence to both counts of the writ of summons and plaint, this defendant saith that, at the several times in plaint mentioned, the defendant was a sub-inspector of constabulary in Ireland, duly appointed under the Acts relating to the said force; and as such, by due and lawful authority, to wit, by said order of the Lord Lieutenant, authorised and empowered to act, and employed in aid and assistance of the Revenue of Excise, by virtue of said several Acts of Parliament in that behalf, and of said order; and saith that the causing said Michael Murphy to go before said Justice of the Peace, and swear said information, and causing said Justice to grant the said warrant, and causing the said dwelling-house of plaintiff to be searched and examined, and the breaking and entering the said dwelling-house, and forcing open doors, and severing, and removing, and opening the said boxes, drawers, locks, and fixtures, were acts done by this defendant, as such sub-inspector of constabulary, in the course of his duty and employment under such authority as aforesaid, *bona fide*, and without malice, and in respect and by reason of a suspected infraction by the plaintiff of the laws in force relating to illicit distillation and searching for illicit spirits in Ireland; and he saith that, before this action was brought, no notice in writing had been delivered to defendant, or left at his usual place of abode, by the attorney or agent of the said plaintiff, clearly and explicitly containing and setting forth the cause or causes of such action, the time when, and the place where such cause or causes of action arose, the name or place of abode of the person or persons in whose name or names such action was intended to be brought, and the name and place of abode of the said attorney or agent, as required by the Act of Parliament in that case made and provided.

6. And, for a further defence to both the said counts, the said defendant pleaded, sixthly, that the several acts by said fifth defence admitted to have been done by defendant, were done by him under the circumstances, and for the reasons in said fifth defence mentioned, and that this action was commenced after the lapse of three calendar months next after the doing of the said several acts, contrary to the provisions of the Act of Parliament in that case made and provided.

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7. And, for a further defence to both said counts, the said William Hewitson Matthew saith that the several acts, by said fifth defence admitted to have been done, were done by him for the reasons and under the circumstances in said fifth defence mentioned, and were done in the county Cavan, and not elsewhere; and he saith the venue in this action has been laid in the county of the city of Dublin, and not in the county of Cavan, contrary to the provisions of the Act of Parliament in that case made and provided; and therefore he defends the action.

The plaintiff demurred to the fourth, fifth, sixth, and seventh defences.—Joinder in demurrer.

The information of Michael Murphy, referred to in the pleadings, was in the hands of the Judges.

Sidney, and *Harkan*, in support of the demurrers.

1. The fourth defence is insufficient as a plea of justification, inasmuch as the defendant has not brought himself within the protection of the Excise Acts. Those who "aid and assist" the Revenue are not entitled to the same protection as its own officers. The mere fact of his being an officer of constabulary does not protect him.

2. The defendant in his plea neither states the grounds of suspicion, nor the facts stated in the informations.—[CHRISTIAN, J. We can look at the informations for the purposes of the argument.]—It is clear from the language of the 1 & 2 W. 4, c. 55, s. 17, that the grounds of suspicion must be stated in the information; and it is not enough that the information should say, "I have received information which I believe and refuse to disclose," because if that were so, the 18th section, enabling the officer to search without

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a warrant in cases where he is certain to find, and to plead the finding as a justification, would be useless. The "information" in this case is analogous to the affidavit upon which a Judge's fiat is obtained, and should fall within the same principles: *Bateman v. Dunn* (a). The statute in the present case expressly directs that the grounds of suspicion should be set forth; and that takes the case out of the well-known class of cases establishing the privilege of the executive: *Regina v. Richardson* (b).

3. The plea does not state that spirits were concealed; and where a justification is relied on, all the facts constituting that justification must be specially pleaded: see *Lawrenson v. Hill* (c); 1 *Saunders' Rep.*, p. 298, referring to *Co. Litt.*, 283 A and 303 B, and 3 *Mod.*, p. 187-8; *Matthews v. Casey* (d); *Lamb v. Mills* (e).

4. The warrant in the present case has been issued to the wrong person, and is not, therefore, within the statute; the statute names the person who makes the information as the person to whom the warrant is to be issued. It is as the servant of M'Curdy that the defendant pleads his privilege.

5. The fifth, sixth, and seventh pleas are bad, because the defendant has not shown that the constabulary are entitled to step into the shoes of the Excise; and even if he had, he would not be entitled to the protection claimed, inasmuch as he purports, on the face of the plea, to have acted under a void warrant. It cannot be said that the word "privileges" in the 20 & 21 *Vic.*, c. 40, extends to the protection claimed, but merely refers to the share in the spoil to which the revenue officers were entitled under the 47th section; and as for the local venue that is attempted to be set up, the statute on which they rely has been repealed by the Common Law Procedure Act 1853, sec. 62, which makes all personal actions transitory.

Serjeant *Armstrong*, and *Hamill*, contra.

1. The 17 & 18 *Vic.*, c. 89, s. 3, and the 20 & 21 *Vic.*, c. 40, s. 5, read together, transfer to the constabulary, as soon as they begin to act in aid of the Excise, all the rights as well as the duties

(a) 7 Dowl. P. C. 105.

(b) 3 F. & F. 693.

(c) 10 Ir. Com. Law Rep. 177.

(d) 1 Salk. 107-8; and 4 *Mod.*

(e) Com. Dig. Plead. [E 17.]

of the Excise. It is a mistake to suppose that the word "Excise" in the latter statute means "officers of excise." H. T. 1866.
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2. The person appointed by the statute to judge of the sufficiency of the grounds of suspicion is the Magistrate before whom the "information" is made. The existence of such a discretion in the present case distinguishes this from the case of *Regina v. Richardson (a)*, cited on the other side. If the plaintiff's view be correct, the 17th section of the statute of W. 4, would be only applicable where the 18th would apply. It was not necessary to have stated the names of the parties from whom the information was obtained which led to the suspicions deposed to; the names were, on the contrary, properly withheld: *Gresley on Evidence* (ed. 1847), 377; 1 *Taylor on Evidence*, s. 860, p. 813, 4th ed.; *Daniel v. Fielding (b)*; *Attorney-General v. Briant (c)*.

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3. The words "reason to believe" must, when read in the light of the context, be taken to be tantamount to "believe."

4. Assuming that the defendant was acting as an excise officer, he was entitled to the month's notice of action, and the three months' statute of limitation given by the 7 & 8 G. 4, c. 53, s. 115, relied upon in the fifth and sixth counts respectively. He was also entitled to the local venue given by the last-mentioned statute. It is not true that the Common Law Procedure Act 1853 has repealed that section, for it does not refer to it in the schedule, and the third section substantially enacted that the Acts referred to in the schedule should be thereby repealed no further than they were stated to be in the schedule. The old statute is not therefore repealed: *Dwarris on the Statutes*, 2nd ed. (1848), p. 531. Other similar statutes are expressly mentioned in the schedule; for instance, the 10 Car. 2, c. 16. Even if the Common Law Procedure Act did repeal the statute of G. 4, it was re-enacted by the 20 & 21 Vic., c. 40, s. 5 before referred to. Even if the constable made a mistake, he is entitled to notice of action: *Lawrenson v. Hill (d)*.

MONAHAN, C. J.

This case comes before us on demurrer to four of the defendant's

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(a) 3 F. & F. 693.

(b) 16 M. & W. 200.

(c) 15 M. & W. 169.

(d) 10 Ir. Com. Law Rep. 177.

T. T. 1866. *Common Pleas.* pleas.—[Having read the pleadings.]—It is unnecessary to go at length through all the arguments which have been put forward upon the first part of the case, as the last point raised by Mr. *Sidney*—

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that with reference to *the person* to whom the warrant was issued—seems to us quite conclusive against the defendant. It is quite plain that, under the statute, the only authority given to the Magistrate is to give a warrant to *the officer* who made the information; so that in the present case, the Magistrate should have given the warrant (if at all) to the one who had made the information. It appears, further, that mere illicit whiskey, in a condition to be consumed is not the thing for which the statute provides a search. Both of these conclusions follow from the words of the 17th section. The words are these:—"If any officers of excise shall know or have "cause to suspect that any private or concealed still, or any back, "vat, cooler, or other vessel used in illicit distillation, or any spirits, "low wines, or wort or wash, or other materials preparing or prepared for distillation, are set up or kept in any house or place, or "that any illegally made malt, or any corn or grain making into "malt, is kept or deposited in any house or place, and shall make "oath thereof before a Justice of the county," &c., "where such "officer shall suspect the same to be set up and kept," &c.; "setting "forth the ground of such suspicion, it shall be lawful for the Justice "or Justices before whom such oath shall be made, if he or they "shall judge it reasonable, by special warrant under his or their "hands and seals, to authorise and empower such officer, by day or "by night, to break open the doors, or any part of such house or "place where he or they shall so know or suspect that any private or "concealed still, back, vat," &c., "and to enter into such house or "place," &c. So that it appears to us that this section does not at all apply to the case of what is called "potteen," in the finished stage, but that it applies only to whiskey in the process of manufacture, and therefore that the plea is bad on that ground. As to the other pleas, we entertained at first some little doubt. To the two counts in the summons and plaint the defendant has pleaded the privilege of getting a month's notice of action, and that the action has not commenced within three months. It is quite clear

that the pleas sufficiently negative malice, to bring the case within the class of cases to which such protective statutes are applicable. The plea substantially amounts to this:—"So far as you charge me "with 'aiding and assisting,' I am entitled to this notice under the "52nd section of the statute of *William*, and also to the three months' "bar; and so far as you charge me with breaking and entering, "what I did was but part of my duty as constable, such duty having "been imposed upon the Excise by the 7 & 8 *G.* 4, c. 53, ss. 114, "115, and 1 & 2 *W.* 4, c. 55, and transferred from the Excise to the "constabulary by the 20 & 21 *Vic.*, c. 40; and therefore, as such "constable, I am entitled to the same protection." We have, therefore, come to the conclusion that these pleas are well founded. With regard to the venue plea, we do not think it good; it was not indeed much relied on at the Bar; and we do not entertain any doubt but that the Common Law Procedure Act has made the venue transitory, even without any direct repeal of the provision in the former Act.

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Common Pleas.
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We therefore allow the demurrer to the fourth and seventh defences, and over-rule the demurrer to the fifth and sixth.

HEALY v. HEALY.*

H. T. 1866.
Jan. 15.

In this case a conditional order to confirm an award having been obtained on a former day, the defendant now appeared to show cause against its being made absolute. It appeared that certain

After the service of the notice given by the 19 & 20 *Vic.*, c. 113, s. 16, requiring

the opposite party to appoint a new arbitrator as a condition precedent to the appointment of a *sole* arbitrator, seven clear days must elapse, upon any of which the opposite party might appoint an arbitrator; and, therefore, the time that intervened between the expiration of a reference and the subsequent enlargement of the time for making the award by order of a Judge, cannot be counted in the seven days.

Quære.—Whether the refusal of an arbitrator, after having heard a portion of the case, to act any further in the matter, constitutes such a "disagreement," within the meaning of the Common Law Procedure Act 1856, as would authorise the interposition of the umpire?

* *Coram* MONAHAN, C. J., CHRISTIAN and O'HAGAN, JJ.
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matters being in dispute between the plaintiff and the defendant, an action had been brought and prosecuted until ripe for hearing at the Summer Assizes for 1865, when, on the eve of trial, an agreement was entered into between the plaintiff and the defendant to leave the case to arbitration. A consent was then prepared and signed by the respective attorneys for the parties, referring the settlement of the matters in dispute between them to two gentlemen, one of whom was nominated by the plaintiff, and the other by the defendant—viz., Mr. B. Purser and Mr. J. W. Pim. It was provided that the arbitrators were to have power to call in an umpire in case of their disagreeing; and that the award was to be made in writing, on or before the 2nd of August, unless the arbitrators should think fit to extend the time for doing so. This consent was made a rule of Court on the 22nd of July. On the 26th of the same month the arbitrators nominated a Mr. James Marks to act as umpire. The arbitrators and umpire then entered upon the arbitration, and from time to time adjourned the same by writing under their hands, the last occasion being the 21st of August, and the adjournment being to the 29th then instant. On the 22nd of August Mr. Pim, the arbitrator nominated by the defendant, wrote the following letter to the plaintiff:—

“Dear Sir—Since yesterday, I have considered about the arbitration of Healy’s, and have come to the conclusion of not again meeting or having anything more to do in this case.—Yours very truly,
“JOSEPH W. PIM.”

It appeared, from an affidavit made by Mr. Pim, that he was induced to withdraw from the arbitration by the nature of the evidence adduced on both sides, and the difficulty arising out of the points of law connected therewith.

On the 29th of August the plaintiff, by notice in pursuance of the statute 19 & 20 Vic., c. 113, s. 16, called upon defendant to appoint an arbitrator in Mr. Pim’s place within seven days. On the 31st of August the plaintiff’s attorney caused a notice to be served on the other party, of an intended application to a Judge in Chamber, that the time for making the award should be enlarged; and on the 12th of September Mr. Justice O’HAGAN made an order

that "The time for making the award under the order of reference
 "in this cause, bearing date the 22nd of July last, be enlarged
 "until the 20th of October next, on the ground that J. W. Pim, one
 "of the arbitrators in the said order named, did, at the time and
 "under the circumstances in said affidavit mentioned, decline to
 "act further as such arbitrator."

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The defendant not having appointed any new arbitrator, the plaintiff, on the 15th of September, by writing under his hand, appointed Mr. B. Purser to act as sole arbitrator; and on the 16th of September served the defendant with notice of having done so. On the 17th of October Mr. Purser, as sole arbitrator, made his award in favour of the plaintiff, and directed that the defendant should pay to the plaintiff the costs of the cause, the reference, and the award.

Counsel for the defendant now appeared to show cause against the conditional order obtained on a former day, that the said award be confirmed.

Sidney, and *J. W. Harris*, for the defendant.

The award is bad for several reasons:—

1. Because Mr. Justice O'HAGAN had no jurisdiction to make the order for the enlargement of the time for making the award after the time to which it had been extended by the arbitrator had expired: *Doe d. Jones v. Powell (a)*.

2. Because seven days had not, within the meaning of the 16th section of the Common Law Procedure Act 1856, elapsed from the service of the notice, inasmuch as the seven-day notice was inoperative from the 29th of August to the 12th of September, when the time for making the award was enlarged, and that period cannot therefore count; during all that time the defendant was not in a position to appoint a substitute for Mr. Pim.

3. The award made by the sole arbitrator was wholly void, because such a "disagreement" had occurred as called the umpire into action, and he was the only person whose award would be good: *Russell on Arbitration*, 3rd ed., p. 225; *Cudliff v. Walters (b)*; *In re Tunno v. Bird (c)*.

(a) 7 Dowl. 539.

(b) 2 Moo. & Rob. 232.

(c) 5 B. & Ad. 488.

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Chatterton, and *J. B. Murphy*, contra.

1. The suggestion that Mr. Justice O'HAGAN had not jurisdiction to make the order enlarging the time, when he did, is met by the case of *Ward v. Secretary of State* (a), following *Browne v. Collyer* (b).

2. The moment the order was made enlarging the time for making the award, the immediate effect was to give a vitality to the days which had elapsed since the service of the notice, such as they did not before possess. It is to be presumed that the defendant knew that the Court would make an order having a retrospective operation, and he was not therefore damnified by the course adopted by us. The jurisdiction of the arbitrator was not entirely gone, but only *sub modo: omnis ratihabitio retrotrahitur*. Even supposing that an act done at the time by the arbitrator would not have been binding, it does not follow that an act done by one of the parties themselves would also be ineffectual: *Browne v. Collyer*.

3. In order to let in the authority of the umpire, the "disagreement" must be of a distinct and substantial character: see 19 & 20 Vic., c. 113, ss. 16, 17, and 18. A "disagreement" and a "refusal to act" are quite different things.

MONAHAN, C. J.

In this case we have come to the conclusion that the award cannot stand. The facts of the case are shortly thus:—Certain matters in dispute between the parties had been referred to two gentlemen, named by the plaintiff and defendant respectively, with power to call in an umpire. The arbitrators had duly entered upon their office, had named an umpire, had held several meetings, had adjourned from time to time, and, on the last occasion, had adjourned to the 29th of August last. On the 22nd of August the arbitrator appointed by the defendant wrote to the other, stating that he would have nothing more to do with the case. On the 29th the plaintiff served notice upon the defendant, calling upon him to appoint a new arbitrator; and on the 31st of the same month served him with notice of a motion to enlarge the time for making

(a) 32 Law Jour., N. S., Q. B. 53. (b) 20 Law Jour., N. S., Q. B. 426.

the award, which had then expired. On the 12th of September the motion came on before Judge O'HAGAN, and he made an order enlarging the time for a month. Three days after, on the 15th, the plaintiff having ascertained that up to that time no step had been taken by the defendant towards appointing an arbitrator, by way of substitution, by writing under his hand nominated Benjamin Purser, the remaining arbitrator, to act as sole arbitrator. The award now before the Court was prepared by that gentleman, in the capacity of sole arbitrator. Now, assuming that we were prepared to take the view of the matter most favourable for the plaintiff—that the party had the power to serve the seven-days' notice at the time he did, and that there was not such a disagreement, within the meaning of the section, as would authorise the umpire to interpose—still, in order to enable the plaintiff to appoint a sole arbitrator under the provisions of the statute, the provisions of the statute with reference to the seven-days' notice calling upon the defendant to appoint an arbitrator should have been strictly complied with. The party served the seven-day notice upon the very last day to which the authority of the arbitrators extended. That day does not of course count as one of the seven, as the statute expressly provides that the seven days which should elapse after the service of the notice, should be *clear days*. Two days then passed before the notice of motion was served. It is quite impossible to hold that the mere pendency of the notice is to give such a vitality to the days that elapsed before the order for the enlargement of the time for making the award was made, as will make those days count among the "seven" prescribed by the statute.

We are therefore of opinion that the time for making the award having expired the same day that the *seven-day notice* was served, none of the days that elapsed from that till the time of the order made by Judge O'HAGAN should count as among the seven days specified by the Act, inasmuch as the defendant was not during that time in a position to act upon the notice, by appointing a new arbitrator; and consequently we must hold that the appointment of a sole arbitrator, made upon the 15th of August, was premature and nugatory, and the award based upon it, consequently, unsustainable.

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M. T. 1866.

Exchequer.

E. J. KEENE and A. KEENE v. M'BLAINE and others.*

(Exchequer.)

Nov. 3.

To a summons and plaint in ejectment for non-payment of rent, against A, alleging that A "holds, &c., as tenant to the plaintiff," it is a good defence, that "A does not hold the premises in plaint mentioned as tenant to the plaintiffs, as alleged."

THIS was an action in ejectment for non-payment of rent. The summons and plaint was as follows:—"Victoria, &c., greeting. James M'Blaine, the defendant, hath been summoned to answer the complaint of E. J. Keene and Augustine Keene, the plaintiffs, who complain that the defendant holds all that and those, &c., as tenant to the plaintiff under a lease, at the yearly rent of £46. 3s. 1d., and that the sum of £46. 3s. 1d., being for one year of such rent due and ending on the 1st day of June last, is due to the plaintiffs, and therefore the plaintiffs pray judgment against the said defendant, to recover the possession of said lands and premises. Therefore, the defendant is hereby required," &c. The defence was as follows:—"The defendant James M'Blaine appears and takes defence to the action of the said E. J. Keene and A. Keene, and says that the defendant *does not hold the premises in the plaint mentioned as tenant to the plaintiffs, as alleged, and therefore,*" &c.

R. W. Gamble now moved to set aside this defence.

The plaint here is in the usual form; it does not name any other defendants but the one. This case is distinct from all previous cases; for those cases went upon the third section of the Landlord and Tenant Act.† In this case the defence is wrong, unless you hold that the third section of that Act actually repeals the sections of the Common Law Procedure Act relating to ejectment. The sixth section of the Common Law Procedure Act recognises the difference between personal actions and actions of ejectment. The latter action was always one *in rem*. The Common Law Procedure Act, s. 194, provides, with respect to the action of ejectment, that, "Where any

* *Coram* the Full Court.

† 23 & 24 Vic., c. 154.

“party shall claim possession of any lands, tenements, or hereditaments, and shall be desirous of proceeding by ejectment for the recovery of the same, in any of the said Superior Courts of Law, such party shall commence any action for such purpose by a writ of summons and plaint; which writ shall be directed to the immediate tenant, or any one tenant in possession as defendant, with the addition of the words ‘and all persons concerned.’”—[PIGOT, C. B. Is not the first allegation of the plaintiff here that “the defendant holds”? Now, if the defendant holds, no matter how many are in possession, the plaintiff shall be entitled to judgment against them.]—From the 194th section it appears that, though there are a number of persons in possession, as a number of next-of-kin, it is not necessary to name them as defendants, but they must be served; therefore an ejectment may be brought without naming the others; and the third section of the Landlord and Tenant Act will not apply. In *Murphy v Carey* (a), one of several defendants pleaded that he, together with the other defendants, did not hold as alleged.—[PIGOT, C. B. There was no decision in that case. The difficulty is, that if you stated that M’Blaine and others held, and directed the writ to M’Blaine, then you would recover, by proving that any stranger was tenant; so that the plaint might always contain a fiction.]—In *Bell v. Beatty* (b), Monahan, C. J., throws out the opinion that the defence ought to be, that the defendant or any other person does not hold. This is the proper defence; for the question is really as to the plaintiff’s title. If you allow this defence, a mere stranger might come in, and say that he did not hold of the plaintiff. The 186th General Rule provides for the service of the writ in ejectment for non-payment of rent; that it shall be served on the tenant under the lease or instrument sought to be evicted, and his assignee, and on any person in possession, or in receipt of the rents and profits of the premises sought to be evicted. The same difficulty would arise in an action of covenant.—[FITZGERALD, B. No doubt the form you contend for is the ordinary form. The difficulty is, that the section says the “writ shall be directed to the immediate tenant, or any one tenant

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Exchequer.
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(a) 12 Ir. Com. Law Rep., App. ix. (b) 6 Ir. Com. Law Rep. 390.

M. T. 1865. "in possession as defendant, with the addition of the words 'and
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 M'BLAINE. Act expounds what the intention of the Legislature was. Then, when the section comes to the defence, it says it must traverse a material allegation.]—The allegation is, that the defendants hold. Who are they, unless the persons named in the margin?—[PIGOT, C. B. No, those named in the body of the form 17, Y. H. and J. K.]—Then your decision is upon the old Rules; and on these we have *Murphy v. Toohey* (a). What the plaintiff does is, to claim the premises as landlord: *Figgis v. Hickey* (b).—[PIGOT, C. B. In all those cases was not there a plurality of persons named in the body?]—Not in *Bell v. Beatty*. See section 55 of Landlord and Tenant Act, 23 & 24 Vic., c. 154.

M'Mahon.

There is a great distinction between an ejectment on the title and one for non-payment of rent. Ejectment for non-payment of rent is always for breach of contract. According to the forms in the Common Law Procedure Act in the latter case, the plaintiff alleges that the defendants hold the lands as tenants to the plaintiffs, not as tenants to the plaintiffs or some or one of them, as the title is alleged in case of ejectment on title. The Landlord and Tenant Act is not in conflict with the Common Law Procedure Act, as to pleading. It only altered the modes of service. Nobody is to be served except the person in possession as tenant, under section 55.—[FITZGERALD, B. The form for which Mr. Gamble contends is a very usual one. The rule on the demurrer in *Murphy v. Carey* is not reported.]—No; but the record will show that the Court upheld the defence.—[The record having been sent for, this appeared to be the case.*

Gamble, in reply.

The margin says "all other persons." These are the persons

(a) 3 Ir. Com. Law Rep. 226.

(b) 7 Ir. Jur., N. S. 160.

* See note to this case, *ad finem*.

served. Any defence saying "I, A B, and other persons, do not hold," amounts to an individual denial that any one of them holds.—[PIGOT, C. B. How can you say that a defence that A B does not hold with others amounts to a traverse that none of them hold?—FITZGERALD, B. Your argument comes to this, that the defendant must traverse something which is not alleged.]—The day before the defence is filed the defendant may assign; and then the plaintiff loses his action.—[PIGOT, C. B. In such a case, I would at once amend.—FITZGERALD, B. The Common Law Procedure Act never intended to dispense with the party finding out what his own case was; it only deals with the stating it].

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PIGOT, C. B.

The only difference between the present case and that of *Murphy v. Carey* is, that in *Murphy v. Carey* the writ alleged "that the defendants held all that and those," &c., "as tenants from year to year to the plaintiffs, at the yearly rent," &c., "that the sum of £— is due," &c., "therefore the plaintiffs pray judgment against the said defendants to recover the possession of said lands," &c. The writ was directed to certain persons named, "and to all persons concerned." Those persons named were made parties to the writ, by its informing them that they were summoned to answer the complaint of the plaintiffs. In the case before us, the writ of summons and plaint alleges that the *defendant*, named as such, *holds* the lands *as tenant* to the plaintiff under a lease. The person so named as defendant took defence, and traversed the allegation of his tenancy, by saying that he "does not hold the premises in the plaint mentioned as tenant to the plaintiff as alleged." The defence is silent as to the persons. Mr. *Gamble* contends that the defence should not only traverse the tenancy of the defendant, which is alleged, but state also that there is *not* a tenancy in other persons, which is *not* alleged. *Murphy v. Carey*, in the decision of the Court upon the demurrer, is direct authority against this argument.

The landlord, in such an ejectment as this, is obliged to prove the tenancy which he has alleged. And he may be obliged to prove this tenancy, not only against the persons named in the writ, but against

M. T. 1866. any other persons who, *having been served*, have taken defence by traversing the allegation of tenancy. Those who are named in the body of the writ are so named as defendants. But the writ is also directed to "all persons concerned," in order to apprise them also of the fact that proceedings are taken to recover possession of the lands, and of the ground on which it is sought so to recover them. That is the object of the statute. It does not mean that a man who describes the tenancy as existing between himself and A B and C D, and who directs the writ to A B and C D, and "all persons concerned," intends to describe the tenancy as subsisting between himself and A B and C D, *and persons not named*. The defence here says, that the defendant does not hold as alleged. It traverses a material allegation of the plaint. The objection cannot be sustained, that it ought to have traversed what has not been alleged. The same traverse must have been made by any person who, being served, or being permitted to defend, should put in a defence to the action on the ground of a denial of tenancy. As to the difficulty of finding out the representatives of a tenant, undoubtedly there are difficulties in determining, in certain cases, who are the persons between whom and the plaintiffs the relation of landlord and tenant subsists. That difficulty, and a risk of failure, always existed in every action of covenant for rent against a person sued as assignee of the lessee. All persons acquainted with proceedings at Nisi Prius know how serious such difficulties from time to time were before the late Acts, which have so largely extended the former amendment. The difficulties suggested in this argument would be readily removed by any Judge, exercising the power of amendment now given to him, if he were satisfied that no injustice would be done, and that the amendment would aid the determining of the real controversy between the parties.

FITZGERALD, HUGHES, and DEASY, BB., concurred.

Motion refused.

MURPHY v. CAREY and Others.

THE Reporter has obtained from the officers of the Court the following abstract of the pleadings in this case. The plaint alleged "That the defendants held

all that and those," &c., "as tenants from year to year to the plaintiffs, at the yearly rent of," &c., "and that the sum of," &c., "is now due, therefore the plaintiffs pray judgment against the said defendants to recover possession of said lands," &c.

H. T. 1862.

MURPHY
v.
CAREY.

Cunningham, one of the defendants, pleaded:—"That he, together with the other defendants in this suit, does not hold the lands in plaint mentioned, in manner and form as therein alleged." Plaintiffs obtained leave to traverse, take issue and demur.—[See the motion reported 12 *Ir. Com. Law Rep.*, App. ix.]

The following points were noted for argument:—First; because the said defendant admits that the said lands were held under the said plaintiffs, from year to year, at the yearly rent in the plaint mentioned; and that said defendant himself holds of said tenancy. Secondly; because said defendant does not state or allege that said rent did not accrue in point of fact to the plaintiffs under said yearly tenancy, or allege or show that same has been paid to the plaintiffs by the defendant himself, either alone or jointly with the other persons who hold said lands, at such yearly rent aforesaid, as such yearly tenants. Thirdly; because said defence does not show or allege that the rent claimed by the plaintiff has been in any manner discharged or satisfied; but, on the contrary, admits rent due, and possession of the lands. Fourthly; because said defence is not in conformity with 16 & 17 *Vic.*, c. 175.

On the 29th of January 1862, the Court, on argument, over-ruled the demurrer.

Judgment Roll, Hil. 1862, No. 130.

H. V. 1865.
Queen's Bench

HORNSBY *Appellant*; CONSIDINE *Respondent*.*

Feb. 4.
 May 22, 29.

(*Queen's Bench*).

The S. Navigation Act, 2 and 3 Vic., c. 61, sec. 58, imposes a penalty on any person who should throw or deposit in the river S. any ballast, gravel, or other matter or thing, so as to interrupt or obstruct the free passage of water through the same, or the navigation thereof.

Held,—that C., having placed nets attached to movable frames in the S. for catching eels, was not liable to conviction under this section.

The same Act, sec. 38, imposes a penalty on making, &c., any weir, dam, watercourse, or other matter or thing in the river S., or any weir diverting the waters of the S., or introducing into it other waters, &c., which, in the opinion of the Commissioners of Public Works, may prove injurious to the navigation thereof, or to the drainage, &c.

Held (HAYES, J., *dissentiente*)—That in order to enable Justices to convict under this section, the Commissioners should first determine the act complained of was productive of such injury.

THIS was an appeal from a decision of the Magistrates of the county of Tipperary, in the form of a special case stated for this Court. The special case contained the following statements:—At a Petty Sessions holden in and for the Petty Sessions district of Killaloe in the county of Clare, on the 22nd day of December 1864, before us, the undersigned Justices, acting in and for the said county in the Petty Sessions district aforesaid, one Michael Considine was charged in and by a certain summons, at the suit of the appellant, as follows:—viz., “For that he, with others, on the 26th day of October 1864, erected in the river Shannon, at or near Ballina, in the county of Tipperary, certain matters or things, that is to say, certain frames, anchors, and nets in the said river, contrary to the statute.” And the said parties being then respectively present, the complaint was duly heard before us, and upon such hearing we ordered as follows—“Dismissed, with five shillings costs.” At the hearing of the said complaint, the complainant relied upon the Acts of 5 & 6 W. 4, c. 67, and 2 & 3 Vic., c. 61; and it was contended on the part of complainant that, by section 36 of the said last Act, it was enacted and declared that the river Shannon was, and for ever thereafter should be, to all intents and purposes, a public navigable river, and that all the Queen’s liege subjects might have and lawfully enjoy their free passage in and along, through and upon said river Shannon, with barges, lighters, and other vessels; and also all necessary and convenient liberties for navigating the same, without let, hindrance or obstruction whatever, on paying such rates, tolls and

* *Coram* O'BRIEN, HAYES, and FITZGERALD, JJ.

duties as were by the said Act appointed to be paid, and complying with the rules, orders, regulations and bye-laws as should be made by the said Commissioners under the provisions of said Act, and under certain other provisions which do not apply to this case.

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That by section 37 the care and conservancy of the said river were vested exclusively in the said Commissioners for the execution of said Act. By section 38 it shall not be lawful for any person whomsoever, from and after the passing of the said Act, to make, erect, alter, raise, or enlarge any weir, dam, watercourse, or other matter or thing in the said river Shannon, or in any of the rivers aforesaid, within the limits which shall be defined as hereinafter directed, or to divert the waters of any of the said rivers, or to introduce into the same respectively any other waters or drainage which, in the opinion of the said Commissioners, may prove injurious to navigation thereof, or to the drainage to be effected under the said Act; or to fish upon or from any of the weirs or dams, or other works, which should be erected by the said Commissioners, without the consent of the said Commissioners; which consent should be signified as therein. And any person who should offend against any of the provisions aforesaid, and might be convicted thereof before any Justice or Justices of the Peace where such offence should be committed, by the oath of one or more credible witnesses, should, for each such offence, be fined by such Justice or Justices in a sum not exceeding £10. It was further contended that, according to the true construction of the said 38th section, the Commissioners were the proper persons to form an opinion as to what might be injurious to navigation. It was admitted that the powers vested by that Act in the Shannon Commissioners are now vested in the Commissioners of Public Works. Evidence was given for the complainant that the defendant set in the river, within the jurisdiction of the Commissioners, two engines for catching eels, consisting each of an iron frame with a net attached, which lay on the bed of the river, held with an anchor; said frames were shaped in the form of the letter D, about eight feet wide at the base, and five feet from the base to the top of the arch, and were laid with the base resting on the bed of the river; that the top of one of said

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engines appeared about six inches over the water, and the top of the other was nearly even with the surface of the stream. It was sworn by P. Ryan, D. Morgan, and W. Molloy, and by a water-bailiff named Enright, in the employment of the fishery conservators, and no evidence to the contrary offered, that the placing of such engines was, in their opinion, an obstruction to the free navigation of said river, and that if a boat descended the stream and struck on said engines, it would be in danger of being overturned. The witness Enright, on cross-examination, admitted that the engines were put out after dark and taken up before morning, and frequently lifted during the night; that said engines were licensed by the fishery conservators; that he was not obstructed by said engines, for he knew where they were; that he would not consider them an obstruction in the middle of the day, because he could see them, but at night he could not; that they never obstructed him when he was looking for them; that there was no attempt at concealment by the parties; and that he had seen on one occasion one of said engines carried lower down by the current. A document purporting to convey the opinion of the Commissioners of Public Works was given in evidence, and the signatures proved by the complainants, who also proved that the proceedings were instituted by direction of the Commissioners; said document was dated at the office of Public Works, Dublin, 14th of November 1864, and signed by two of the Commissioners of Public Works in Ireland.

It was then contended, on the part of the defendant, that the appellant's case failed, inasmuch as there was no sufficient evidence that the offence alleged in the summons was, in the opinion of the Commissioners, injurious to the navigation of the river Shannon; inasmuch as the document relied on for that purpose was vague and unsatisfactory, merely stating, in general terms, that the placing of anchors, frames, and nets may be injurious to the navigation of the river, and not going on to say that doing what respondents did was injurious to said navigation; also that respondent was not named or referred to in such document, nor any place mentioned therein to connect said document with his case; that inasmuch as the said engines were placed in the river by night only, and

removed during the day, they did not come within the operation of the 38th section; that the obstructions therein contemplated were obstructions of a permanent character; and the words "matter or thing," in said section, were to be construed with reference to the antecedent words, "any weir, dam, or watercourse," and meant "matter or thing" *ejusdem generis*, that is to say, of a permanent character; and that the case was brought more to prohibit the taking of eels at Killaloe than because of any real obstruction to the navigation of the river, which at that particular place is only navigable for fishing cots. And whereas, upon the hearing of said complaint, three of us were of opinion that, reading the 38th and 40th sections together, a movable net or anchor was not contemplated in the words "matter or thing," but rather every object which may be permanently erected, or heavy obstacles which may be thrown into the river to impede the navigation; that a frame net, which was proved to be constantly removed, could not be, nor was, any impediment to the navigation. That, in the same manner, an anchor which was proved to be constantly removed could not be any impediment to the navigation, it having been shown, moreover, that the part of the river in which the net and anchor were placed was below the weir wall, and in the rapids, where it is impossible that large boats could either arrive or be navigated. And further, that the opinion of the Commissioners was not contemplated by the Act as referring to a constantly removed net or anchor. And two of said Justices being of a contrary opinion, the majority gave judgment against the appellant as aforesaid.—Dated this 14th of November 1864.

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Edward Hornsby, secretary to the Commissioners of Public Works, submits that the above decision was erroneous, for the following reasons:—First; because the erecting any "matter or thing," such as the frames and anchor in the case mentioned, constituted an offence against the provisions of the 38th section of 2 & 3 Vic., c. 61, although it should not be proved that such erection, in the opinion of the Commissioners, might be injurious to the navigation of the said river. Secondly; because, if it should be considered necessary to show that such erection might be in-

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jurious to the navigation of the said river, in the opinion of the Commissioners, that point was conclusively established by the opinion of the Commissioners given in evidence. Thirdly ; because the said frames and anchors were not exempted from the operation of the above provision of the Act, though the evidence may have shown that they were movable, or in fact moved from time to time.

There was another appeal from a decision of the same Justices, between the same parties, on a summons under the 58th section of the 2 & 3 Vic., c. 61. The special case stated a summons, for that the said Michael Considine, with others, on the 28th of October 1864, did, without the consent of the Commissioners of Public Works in Ireland, deposit in the river Shannon, at Ballina, in the county of Tipperary, certain matters or things, that is to say, certain frames, anchors, and nets, for the taking of eels, so as to obstruct the navigation of said river, contrary to the statute. This case also was dismissed by the Justices. The 58th section relied on by the complainant, is as follows :—" That, if any person "shall throw or deposit any ballast, gravel, or other matter or thing, "so as to interrupt or obstruct the free passage of water through "same, or the navigation thereof, into or in the said river, or any of "the cuts, sluices, or canals aforesaid, or any of the rivers aforesaid, "which shall have been improved by the Commissioners under this "Act, or shall, without the consent of the said Commissioners, lay "any ballast, gravel, stones, dirt, rubbish, lime, timbers or clay, on "any of the banks, locks, or tramways of any of the rivers aforesaid, "or maliciously open any lock, &c., as therein, every such person, "being convicted thereof before any Justice or Justices of the "Peace, shall be fined by such Justice or Justices a sum not "exceeding £5." Stating evidence, as in the first case, the special case proceeds :—"It was contended, for the respondent, that the obstructions in said section contemplated were obstructions of a permanent character ; that the words "other matter or thing" meant ballast, gravel, or other matter or thing *ejusdem generis* ; also, that the next succeeding section (59) showed that that was the true meaning of the words, inasmuch as it made provision that, if any nuisance or impediment to the navigation aforesaid should be con-

tinued, or should not be abated, removed, or discontinued, within seven days after notice in writing, signed by the said Commissioners (or as therein), it should be lawful for the Justice or Justices aforesaid to impose the penalty therein: that the weir walls maintained by the Commissioners at Killaloe and Castleconnell were substantial obstructions to navigation. The findings were the same under the 58th as under the 38th section. The appellant's points were, first, that frames and anchors, proved to be deposited in the river, and impeding the navigation thereof, fell within the section, though movable, and not permanent structures; secondly, that said frames, &c., were not exempted merely because the part of the river where they were deposited might not be navigated by boats of a large size; thirdly, that the certificate of the said Commissioners established conclusively that the said frames and anchors might be obstructions to the navigation of the said river.

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May, for the appellant.

There is no finding by the Magistrates that those engines were not an obstruction to navigation.—[O'BRIEN, J. Does it appear that no boats ever went there?—No; but the whole river Shannon is navigable by law: 2 & 3 Vic., c. 61, s. 36. Though this engine is not fixed into the soil by poles, it is fastened by an anchor; and the Commissioners have given it as their opinion that it was injurious to navigation. The putting it out by night only aggravates the offence, as then it could not be seen; while in a navigable river the subject is entitled to free navigation at all times; and small boats are entitled to protection as well as large. As to the second case, those things are clearly within the 58th section. There the word is "deposit." If this decision of the Magistrates be good, the river may be covered with these frames, if they are only movable. Under the Summary Jurisdiction Act the Court may deal with this matter as they see fit.

James Murphy and *C. R. Barry*, for the respondents.

It is no argument to say that those frames may be multiplied, and there would be an obstruction. This would make all weirs

H. V. 1865. an obstruction. There is no navigation found by the Magistrates.
Queen's Bench —[FITZGERALD, J. It was not necessary. The Commissioners
HORNSEY are to keep the river clear for navigation.]—If this case was
v. brought forward *bona fide* to remove an obstruction to the navi-
 CONSIDINE. gation, my case would be gone.—[HAYES, J. We have nothing to
 do with the *bona fides* of the Commissioners.]—The words “other
 matter or thing” must mean *ejusdem generis* with the preceding
 words of the section. If the appellants are right, moorings would
 be an obstruction to navigation.—[HAYES, J. There are different
 ways of using a river—using it as a highway, and using it for
 fishing purposes. Now, the first use is preferred in this section;
 therefore your objection does not apply.—FITZGERALD, J. Per-
 manent moorings would be injurious to navigation.]—In the 58th
 section “matter or thing” must mean of permanent character.
 The question must be whether, in point of fact, the object is
 an obstruction to navigation; yet there is no finding by the
 Magistrates here on this point. The Court cannot go beyond
 their finding. Section 58 would be quite unnecessary if the
 words “matter,” &c., contemplated every object that could be
 put into the river. It is sought to give a greater right here
 than if the river was navigable by Common Law.—[O'BRIEN, J.
 Under the 58th section the Commissioners have no authority
 to determine in the matter; it must be found by the Magistrates.]—
 Yes, like a jury: *The Queen v. Betts* (a). There, Lord Campbell
 says:—“The true question is, whether a damage accrues to the
 “navigation in the particular locality; and that is a question for
 “a jury. In this Pateson, J., and Erle, C. J., concurred. *The*
King v. Russell (b) went still further on this point. The decision
 of the Magistrates, that no one ever found any obstruction from
 these things, is decisive on the point of the obstruction. Yet there
 is always evidence given in similar cases of some obstruction from
 the nuisance complained of.

The arguments were resumed in Easter Vacation.

The *Attorney-General*, in reply.

If it be decided that the placing of these movable engines

(a) 16 Q. B. 1022.

(b) 6 B. & C. 566.

is legal, the Shannon will be studded with them. Each owner will say, "my engine is a small matter." There is no finding that this is not an obstruction to the navigation. It is not necessary, under the first clause of the 38th section, to prove that the matter in question is injurious to navigation. The act of increasing the quantity of water might impede navigation, by increasing the current, and might impede the drainage. As to the 38th section, might a person put down a pole with stakes, and remove it at the end of a week, and escape all penalties, because this section refers to deposits of a permanent character? The Magistrates do not say that this is not an obstruction; only that it would not interfere with large boats. The case of *The King v. Russell* (a) is substantially affirmed by *Roe v. Tindall* (b). In *The Queen v. Betts* (c) it was held that finding of no nuisance to navigation was equivalent to a verdict of not guilty. That is not said here. I admit they do not find that it is.—[FITZGERALD, J. But if in section 38 the words "which in their opinion," &c., apply to the whole section, you cannot make it an offence until you prove their adjudication on this particular thing, and that communicated to the traverser. It does not appear that this engine ever was put down after the Commissioners made their adjudication.]—But the respondent would not come here if he did not intend to maintain his right to put these engines down.—[O'BRIEN, J. It is hard to say that he should be convicted for doing what at the time mentioned might have been legal.]—My argument is, that it is a specific offence to erect, &c., quite independent of the subsequent clause about the opinion of the Commissioners. If the Court is against me on that point, I contend that I have the opinion to show that the respondent has done that which might prove injurious to navigation. It is not necessary to prove that this opinion was communicated to the person offending. As to the 58th section, the respondent "throws" his anchors into the river to fasten his nets.

FITZGERALD, J.

There are before us now two cases, though, in point of fact, they

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(a) 6 B. & C. 566.

(b) 6 A. & E. 143.

(c) 16 Q. B. 1022.

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are the same; they are appeals from summonses issued under different sections of the 2 & 3 *Vic.*, c. 61, for the same offence. In case No. 1, the summons states that "the respondent, with others, on the 26th of October 1864, erected in the river Shannon, at or near Ballina, certain matters or things—that is to say, certain frames, anchors, and nets, contrary to the statute." The summons in the second case states that "the respondent, on the 26th of October 1864, without the consent of the Commissioners of Public Works in Ireland, deposited in the river Shannon, at or near Ballina, certain matters or things—that is to say, certain frames, anchors, and nets for the taking of eels, so as to obstruct the navigation of the said river, contrary to the statute." The cases came before the Justices at the Petty Sessions; and the majority, being of opinion that no offence had been committed, dismissed the cases. The facts are not controverted. The summons relates to what are called nets for catching eels. These contrivances consist of an ordinary eel net, with a frame, by which the nets were fastened to the bottom of the river. The alleged obstruction relates to the mouth of the net, which was constructed of iron. It appears, from the evidence stated in the case, that these frames were shaped like the letter D, about eight feet by five, with the base in the bed of the stream; that the top of one of the engines appeared six inches over the water, and that of the other was even with the surface of the stream. It was sworn by Ryan, Morgan, Molloy, and a water bailiff named Enright, that the placing of such engines was, in their opinion, an obstruction to the navigation of the river. It was admitted that these engines were put out after dark, and taken up before morning; and it further sufficiently appeared that no actual obstruction did take place. On the hearing of the case, a certificate of the Commissioners of Public Works was put in, stating that, "in their opinion, the placing of frames, anchors and nets in the river Shannon may prove injurious to navigation." This is dated the 14th of November 1864; being nineteen days after the alleged offence was committed. The question is, whether the Justices ought, in point of law, to have convicted the defendant under the 2 & 3 *Vic.*, c. 61? That is an Act to improve the navigation of the river Shannon; and the Board of

Works were thereby empowered to construct certain works in the said river, for the better navigation of the same, and were further appointed guardians of the river, and of these works. We may come at once to the 36th section, which declares that the river Shannon "shall be, to all intents and purposes, a public navigable river, and "that all the Queen's subjects may have and lawfully enjoy their "free passage in, along, through, and upon the said river Shannon, with boats, barges, lighters, and other vessels; and also all "necessary and convenient liberties for navigating the same, without "any let, hindrance, or obstruction whatever, on paying such rates, "tolls, and duties as are by this Act appointed to be paid, and complying with such rules, orders, regulations, and bye-laws as shall "be made by the said Commissioners, under the provisions of this "Act." The 37th section authorises the Commissioners, to whom these extensive powers are given, to define, from time to time, what shall be considered a portion of the river Shannon, for the purposes of this Act. The case before us more immediately depends on the construction of the 38th section.—[Reads it].

It was contended that the words "which, in the opinion of "the said Commissioners, may prove injurious to the navigation "thereof," do not apply to the whole of the previous part of the section, but only to the part immediately before them, beginning with the word "or." I do not think this is the true construction. The Commissioners are appointed not only for carrying out these works, but also for the care and conservancy of the river. I think that this passage should not be applied merely to the words immediately before, but that it overrides the whole section. It is an offence to do any of these things, if, in the opinion of the Commissioners, they are injurious to navigation. It was conceded that, if such was the true construction, it puts an end to the prosecution under section 38, because the Commissioners had never expressed or declared their opinion, or defined what matters would be deemed injurious to navigation, previous to the committing of the alleged offence. If I am right in this, it follows that the summons No. 1 is untenable. The Justices seem to have considered that the section was directed against weirs, dams, watercourses, or other erections of

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a permanent nature, and that it did not apply to a case such as that now before us. I think that they were right in that. Also, as regards the words "other matter or thing," in this section, I think its meaning will be found on reference to sections 39, 40, and 42. Section 40 says, the Commissioners shall, as soon as shall be expedient, cause maps or plans to be made, "setting out all dams, weirs, "watercourses, or other matters or things, which shall then be, "or stand, or be placed or erected in the said river." We find here the same expression, "other matters or things," which obviously apply only to matters of a permanent nature. In section 42 the words "other matter or thing" also occur, and mean things of a permanent character. There, power is given the Commissioners to remove, with the strong hand, whatever they may think injurious to navigation. The case, therefore, under section 38, seems to me to fail. Though there is a difference of opinion among the Members of the Court as to section 38, I believe we are all agreed that the case fails under section 58. The words there are plain. We are asked to decide that fishing with an eel net means throwing or depositing some matter or thing, so as to obstruct navigation. Section 59 gives power to the Commissioners to determine what they think an obstruction to navigation.

It was urged in argument, on section 58, by the *Attorney-General*, that a great public evil would ensue from supporting the decision of the Justices, as the Shannon might be covered with these engines. But the Commissioners have power under this section to make bye-laws, and, if they think this is a nuisance to navigation, forbid it accordingly; and, if I am right in my construction of section 38, there is nothing to prevent the Commissioners issuing a general order. No discretion is left to the Justices under these sections. If the case comes within them, they must convict; and their only power is as to the amount of the penalty. Of course in such a case the ordinary rule applies, that the language of the Act must be clear and plain, in order to create this offence. The Commissioners have not brought this case within either the 38th or the 58th sections; nor do

we think that any mighty public evil is likely to ensue from our decision.

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HAYES, J., concurred with FITZGERALD, J., on the 58th, and dissented as to the construction of the 38th section.

O'BRIEN, J.

These cases involve the consideration of some of the sections of the Shannon Navigation Act (2 & 3 Vic., c. 61). I concur with my Brethren in opinion that the Magistrates' order dismissing the complaint, brought under the 58th section of that Act, should be affirmed. That section imposes a penalty not exceeding £5 upon any person who should throw or deposit in the river Shannon "any *ballast, gravel, or other matter or thing*, so as to interrupt or "obstruct the free passage of water through the same *or* the navigation thereof." The appellant contends that the nets or frames for taking eels, which were placed by the respondent in the river Shannon, as stated in the case, came within the provisions of that section, by reason of the words "or other matter or thing;" and that, accordingly, the respondent should have been convicted by the Magistrates. We think, however, that the nets or frames in question were not within that section; and that the words "*other matter or thing*" should be construed with reference to the preceding words "*ballast*" and "*gravel*," as denoting things *ejusdem generis* with ballast or gravel; and that they were not intended to include such matters as those nets or frames which were not fixed, but movable, and which appear upon the evidence to have been laid down only during the night and removed before morning. The provisions of that section were, in our opinion, directed against obstructions of a more permanent character.

With respect to the dismissal of the complaint under the 38th section, I concur in opinion with my Brother FITZGERALD, that the Magistrates' order, dismissing that complaint, should also be affirmed. The 38th section makes it unlawful for any person "to *make or erect*, alter, raise, or enlarge any weir, dam, watercourse, *or other matter or thing* in the river Shannon," or other rivers therein mentioned; or to divert the waters of any of said rivers,

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or to introduce into the same respectively any other waters or drainage "*which, in the opinion of the said Commissioners, may prove injurious to the navigation thereof, or to the drainage,*" &c.

One of the grounds upon which the Magistrates dismissed this complaint was similar to that on which they decided the other—namely, that the nets or frames in question did not come within the words "*other matter or thing*" in that 38th section. If this was the only objection to the complaint, I should hold, with my Brother FITZGERALD, that the Magistrates were right in dismissing it; but I am further of opinion that, on the true construction of that section, the words referring to the opinion of the Commissioners relate not merely to the other waters or drainage (the introduction of which was prohibited), but govern the entire of the preceding part of the section; and that, accordingly, in order to warrant a conviction under that section, for making or erecting, &c., any "*weir, dam, watercourse, or other matter or thing,*" it is requisite that the Commissioners should have expressed their opinion that the *particular* "*weir, dam, watercourse, or other matter or thing*" complained of might prove injurious to the navigation of the Shannon or other rivers, or to the drainage thereof. According to the express terms of the 58th section, in order to warrant a conviction under it for throwing or depositing "*any ballast, gravel, or other matter or thing,*" it is requisite to show that the act complained of would "*interrupt or obstruct the free passage of water through the river, or the navigation thereof.*" It would, therefore, be for the Magistrates to decide on the evidence whether the act complained of would have that effect, and if they did not think it would, they should dismiss the complaint. But if we adopt the appellant's construction of the 38th section, and hold that the words referring to the opinion of the Commissioners do not govern the entire of the preceding part of the section, the result would be that a party would be liable to be convicted under that section, though the act done by him may have been of a most trifling character, and productive of no injury or obstruction whatever to the navigation or drainage. It is also to be observed, that the power of summoning a party for an alleged offence under that section is not confined

to the Commissioners, but that the prosecution may be instituted by any person. And I cannot think that, under these circumstances, it was the intention of the Legislature that a party should incur the penalties of that section, except the act complained of was one which, in the opinion of the Commissioners, might be injurious to the navigation or drainage. I think, on the contrary, that according to the true construction of that section, it would be for the Commissioners, in the first instance, to determine whether the act complained of was one which might be productive of such injury. And if it was shown that they were of opinion that it was, then their opinion should be conclusive on that question, and it would be for the Magistrates to decide whether the act complained of came within the prohibitory terms of that section, and was done by the party summoned before them. If this be the true construction of the 38th section, I am further of opinion that the document produced before the Magistrates in this case, and relied on by the appellant as the expression of the Commissioners' opinion, would not be sufficient to warrant a conviction. It states in general terms their opinion, "That the placing of frames, anchors, and nets in the the river Shannon may prove injurious to the navigation of the river," without at all referring to the particular frames or nets complained of. Frames and nets may differ materially in size and form; and their effect on the navigation would also depend on the locality in which they are placed; but that document affords no means of ascertaining whether the particular frames and nets in question may not be of such a description as to produce no injury whatever to the navigation.

On these grounds I think that in both the cases before us the Magistrates' orders should be affirmed, and that the appellant should pay the costs of the appeals.

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In re LAURENCE MOYLAN,*

a prisoner in the Four-courts Marshalsea.†

May 31.
 June 3.

M. having obtained a writ of *habeas corpus*, directed to the Marshal of the Marshalsea, and to the Sheriff of D., the Marshal returned that M. had been handed over to him, under a writ of *ca. sa.*, by the Sheriff of D., and had been in his custody since; that while in such custody a Judge of the Bankruptcy and Insolvency Court had required the production of M. as a witness in that Court; that he was brought up on two occasions, in the Marshal's custody, without the knowledge or consent of the Sheriff, and was again brought back to the Marshalsea. On the second occasion M. refused to return with the Marshal, but was compelled to do so.

THIS case came before the Court on argument on the return to a writ of *habeas corpus*. The writ was directed to the Marshal of the Four-courts Marshalsea, and the High Sheriff of the city of Dublin. It appeared, from the returns now made by these officers respectively, that the prisoner had been arrested on the 28th of February, under a warrant from the High Sheriff of the city of Dublin, in execution of a writ of *ca. sa.*, issued at the suit of F. Swan, against the prisoner; that the prisoner had been delivered into the custody of the Marshal, by the Sheriff, on the said day; that the Marshal had retained him in his manual custody ever since, as Marshal of the Four-courts. While he was so in custody, the Court of Bankruptcy and Insolvency proceeded to hear the petition of one Doyle; Moylan being an opposing creditor of Doyle's, it became necessary to examine said Moylan in person before the said Court. That, at the instance of the prisoner's brother, an order was made by Judge Berwick for the Marshal to bring the prisoner up before the said Court on the 29th of March 1865, in order to his being examined as a witness in the said matter. This order the Marshal obeyed; but the matter not being gone into that day, the witnesses were ordered to attend the next day. That the Marshal again attended with the prisoner; and when his examination was over, he again brought him back to the Marshalsea. That the removal of the prisoner on each of those occasions was without the knowledge, authority, or consent of the High Sheriff. That, on the 19th and 22nd of April, and 2nd of

Held, that those facts did not constitute an escape, and that, accordingly, he was still in the lawful custody of the Marshal.

* See this case reported in the Exchequer, *infra*.

† Before the Full Court.

May, the prisoner had been brought up to the Court of Exchequer, in obedience to a writ of *habeas corpus* which the prisoner had obtained from that Court, and that the said Court adjudged the custody and detention of the said Laurence Moylan proper and lawful. That, on the 2nd of May, the Marshal delivered another writ of *ca. sa.* to the Sheriff, commanding him to arrest and detain the prisoner for the costs awarded the Marshal in the Court of Exchequer; and on the 3rd of May the Sheriff duly ordered the Marshal to detain the prisoner accordingly. The Sheriff further returned that, "having no knowledge of the removal of the prisoner on the 29th and 30th of June, and immediately after the return of the prisoner to the said prison, which return was not caused by any act of mine, or the act of any one authorised to act for me in that behalf, and finding him the said Laurence Moylan again within the precincts of said prison, I then again detained, and from thence hitherto, under and by virtue of said writ as aforesaid, and under and by virtue of the detainer, as hereinafter mentioned, do still detain," &c.

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Sidney (with him *Dowse*) now opened the returns.

Onslow's Act does not apply to this case. The Court must assume these returns to be true; if they are not so, the prisoner can have his action. The ground for quashing the writ in the Court of Exchequer was, that it was only directed to the Marshal, and not to the Sheriff also. But it really decides the case of merits; and, being a Court of co-ordinate jurisdiction, this Court ought to be bound by it. *Ex parte Higgins* (a).

Jellett (with him *O'Loughlen*), for the prisoner.

The handing over the prisoner to the Sheriff takes place under the 5 & 6 Vic., c. 95. The order of Judge Berwick was clearly illegal. The 38 G. 4, c. 26, s. 3, is the only Act to authorise such a proceeding; but that is confined to Judges of the Superior Courts. The 44 G. 3, c. 102, is also confined to Judges of those Courts. The fact of obeying that order was clearly an escape. It was

(a) 9 Ir. Law Rep. 414.

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alleged, on the other side, that he went back ; but he went back on compulsion ; that, though he escaped from actual custody, he was still in the custody of the Sheriff ; for the Sheriff was no party to the escape ; that the prisoners in the Marshalsea were in the actual custody of the Marshal, but in the metaphysical custody of the Sheriff.—[LEFROY, C. J. What other place, after that statute, could be, in imagination or in fact, the place of custody for the Sheriff's prisoners than the Marshalsea ?]—The Sheriff's responsibility lasted until the prisoner was handed over to the custody of the Marshal ; after that the Marshal alone was responsible. The words of the Act are, "shall be then in the custody of the Marshal." If the escape is voluntary, a prisoner cannot be re-taken ; if negligent, he can of course. This was a voluntary escape. As to the construction of the Act, it was considered in the case of *Ex parte Higgins* (a).—[HAYES, J. I take you as contending that the Sheriff discharged his duty on the day he handed the prisoner over.]—Yes ; as a con-ble does.—[FITZGERALD, J. If so, the writ ought to be altered ; for it runs, "to take, and safely keep."]—When *Ex parte Higgins* was decided the alarming doctrine prevailed that, unless the Sheriff executed a warrant on handing over a prisoner to the Marshal, there was an escape in passing from one to another. The only point decided in that case is, that manual tradition is sufficient. Then comes the case of *Lamphier v. ———* (b) and that of *Ex parte Staunton* (c). I refer to this as showing that the custody of the Marshal is separate from that of the Sheriff.—[FITZGERALD, J. Is it not the case that subsequent writs are executed by delivering them to the Sheriff only ? How would he be made responsible if the prisoner was not then in his custody ?]—I do not think they issue a *ca. sa.* at all. The object is attained under the 138th section of the Common Law Procedure Act by a side-bar rule ; and that is served on the keeper of the prison. If the doctrine of double custody is admitted, the doctrine of escape is put an end to.—[LEFROY, C. J. What objection is there to that ? You take the opportunity of doing an illegal act.]—But it should not be done by a forced construction—

(a) 9 Ir. Law Rep. 414.

(b) 2 Ir. Jur., O. S. 291.

(c) 5 Ir. Law Rep. 58.

[O'BRIEN, J. This construction does not abolish the doctrine of escape; it only says that it is the act of the Sheriff that constitutes an escape. Suppose the case of a forged order brought to the Sheriff.]—This does not come within the cases where the prisoner went back voluntarily into custody; he was forced to go the second day.—[FITZGERALD, J. *Page v. Williams* (a) does not, I think, touch this point].

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O'Loghlen (with him *Jellett*) was then called on to proceed, but objected that he was entitled to reply to Mr. *Sidney*, who had only read the return, and not gone fully into his argument. To this objection the Court yielded.

Sidney, in support of the return.

The only hardship suggested is, that the prisoner has two parties to deal with instead of one, in order to take advantage of his illegal act. The writ shows that the Sheriff not only arrests but detains the party. The Sheriff, too, must have a right to execute subsequent writs; he cannot take the prisoner out of another custody. The return to the subsequent writ always states that he has taken him.—[HAYES, J. Would it not be a good return, that he had arrested the man, and that he was now in the custody to which he had transferred him previously?—That would not be an arrest under the second writ; that would be excusing himself for not arresting him. The sentence in the Act, "being in the legal custody of the Marshal," means no more than that the Marshal is his gaoler. The Marshal here got judgment against his own prisoner, but had to send the writ to the Sheriff to be executed.—[FITZGERALD, J. Where a prisoner in the county Antrim gaol, for instance, sues out *habeas corpus*, and we commit him to the custody of the Marshal, the Marshal is then our officer, and holds a character quite distinct from that of the officer of the Sheriff.]—*Boothman v. Earl of Surrey* (b). There the Marshal is not the deputy of the Sheriff. *Roll. Abr.*, vol. ii, p. 552, is quoted in *Brown v. Copley* (c); *Wilkin v. Salter* (d).

(a) 1 Ir. Com. Law Rep. 477.

(b) 5 T. R. 5.

(c) 8 Scott, 28.

(d) *Temp. Hardwicke*, 311.

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Moylan objected to coming a second time, though he came willingly the first time. *Watson on Sheriffs*, p. 206.—[O'BRIEN, J. Supposing the prisoner escaped by the negligence of the Marshal, could the Sheriff re-take him?—The Sheriff could; and I believe the Marshal also: *Bac. Abr.*, vol. 7, tit. *Sheriff*. If a person comes to be discharged, the Marshal would apply to the Sheriff to see if any other detainers were lodged.—[HAYES, J. Has he a right to do that?—He has.—[HAYES J. The Sheriff did not know about his escape from legal custody until he got the writ of *habeas corpus*. Can he apply that *ex post facto* to his bringing the prisoner back?]

O'Loughlen was heard in reply.

LEFROY, C. J.

In my opinion the prisoner has not shown his right to be discharged. And for my own part I have come to that opinion upon more than one ground, but first upon the authority of the case of *Ex parte Higgins (a)*, where the construction of this Act of Parliament was fully considered by the learned Judges who decided that case, and it has since received the sanction of the Court of Exchequer. We have not only that case as a decision upon the construction of the Act, but we have the well-established rule of construction which requires that we should not interpret any Act in such a way as to injure the Common Law rights of any party, unless the words of the statute make such a construction necessary. There is another ground upon which I base my judgment against the discharge of the prisoner. It is a principle of law, that when a party is arrested by legal process, there are reciprocal duties and obligations imposed both upon the Sheriff and upon the party taken into custody by the authority of the law. The Sheriff is answerable from the moment of the arrest until the prisoner is brought before the Court to answer in the case. There is the reciprocal duty imposed upon the prisoner by law that he shall remain a prisoner until he is duly discharged; so that, unless the Sheriff consents to let the

(a) 9 Ir. Law Rep. 414.

prisoner go, it is a mistake to say that he may walk out, even though he find the prison door open. That I consider the true and sound principle of law imposing a duty upon the party so arrested, to remain a prisoner when he is arrested. What was the case of the Sheriff before the change in the law which was introduced by the 5 & 6 Vic., c. 95? He had a gaol of his own in which he could lock up his prisoners; but if the doors of that gaol were left open, in such a way as not to implicate the Sheriff by concurrence, the prisoner had no right to make for himself exemption for that which was a violation of law—namely, an escape. The Act of Parliament which changed the law, by depriving the Sheriff of this protection, did not give this right to the prisoner. The provision of the Act is express, that “he shall remain in the custody of the Marshal.” I admit he may be discharged by the voluntary discharge of the officer, but the principle is not to be excluded, that mere negligence will not imply a voluntary discharge. Is it to be argued upon the construction of this Act, that what the Legislature intended was to vary the legal rights of the Sheriff as to the party he had taken in custody, or the duty of the party who was so taken? By the construction put upon this Act in the Court of Exchequer, the prisoner was henceforth to be considered as in the actual custody of the Marshal, and in the legal custody of the Sheriff. This has been called in the argument a fanciful construction; but what was the case under the law as it stood before? Did the Sheriff live in the gaol? No; he entrusted to others the actual custody, and had the right so to entrust them. Did that take away the responsibility of the Sheriff? No. If there were any other processes to be served like the detainer, he was the person through whom they were to be served. Therefore, the construction given to the altered law is no fanciful construction, it is applying to a new state of things the principles that were applicable to the old. Being then in the legal custody of the Sheriff, and not having escaped by the voluntary act of the Sheriff, the Sheriff is bound to have him when called on. In this case he had him in the custody in which he ought to have him. The

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T. T. 1865. Legislature could not have intended to alter the principles of the law in a manner so mischievous to the public.

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In this case I shall not enter into the question which has been referred to in the argument, as to whether the Judge of the Insolvent Court has not a right to issue a writ to bring up a prisoner, or whether he lost that right because it was given to him under the name of "Commissioner," while he is exercising the same jurisdiction, and is called a Judge? Though I would just ask, where is there an intention to alter the law, or contract his powers in this respect? But in the present case, on the grounds I have stated, and following the decisions of the Common Pleas and the Exchequer, I am very clearly of opinion that the prisoner has shown no right to be discharged.

O'BRIEN, J.

I have some doubt in this case, but not sufficient to make me dissent from the conclusion at which the other Members of the Court have arrived. The difficulty I feel is upon the ground relied on in Baron FITZGERALD's judgment in the Court of Exchequer, a copy of which has been furnished to us. The 5 & 6 Vic. c. 95, provides that all debtors shall be committed to the Four-courts Marshalsea. And further, "that the persons imprisoned in the "Four-courts Marshalsea shall be there in the custody of the "Marshal, from whatever Court or by whatever legal process they "shall severally have been committed." And it is, therefore, contended that the principle upon which a prisoner in the custody of the Sheriff could not be re-arrested, after a voluntary escape with the Sheriff's consent, should be applied to the case of a voluntary escape, with the Marshal's consent, of a prisoner in the Marshal's custody. In the present case it is conceded by the Counsel for the creditor, that the order of the Insolvent Court, in bringing up the prisoner to be examined, cannot be relied on; and the case has been argued on that supposition.

It is clear that, under the foregoing statute, the Sheriff ceased to be responsible for the escape of a prisoner when once committed to the Marshalsea, whether such escape arose from the negligence or

deliberate consent of the Marshal. In cases where the gaoler in charge of a prisoner was the officer of the Sheriff, appointed and removable by him, the Sheriff was clearly answerable to the creditor for the negligence or misfeasance of the gaoler; and the prisoner, being in the actual custody of the Sheriff's deputy, was virtually, for all purposes, in the custody of the Sheriff himself. The state of things is, however, different with respect to prisoners committed by the Sheriff to the Marshalsea under the foregoing statute. He was obliged by the statute to lodge the prisoner in the Marshalsea. He has no control over the appointment or removal of the Marshal; and he is clearly not responsible for the Marshal's negligence or misfeasance; and the statute expressly declares that all prisoners in the Marshalsea "shall be there in the custody of the Marshal." Under these circumstances, I confess I entertain some doubts whether the opinion expressed by the late Judges of the Common Pleas, in the case of *Ex parte Higgins (a)*—(namely, that the prisoner, though in the actual custody of the Marshal, may yet be regarded as being in the legal custody of the Sheriff)—was well founded, and should be applied to a case like the present, where the question is as to there having been such a voluntary escape as would render the subsequent arrest of the prisoner illegal. The expression of that opinion in *Ex parte Higgins* may be regarded as extra-judicial, as the only question for the decision of the Court was whether, when the Sheriff committed a prisoner to the Marshal under the foregoing statute, it was necessary that the Sheriff's order of committal should be in writing. It is, however, to be considered that the decision of the majority of the Court of Exchequer, on the previous application made to them by the prisoner, is an authority on the present one; and whatever doubts I may entertain, they are not such as to make me dissent from a similar decision.

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HAYES, J.

It has, in the course of the argument, been taken as clear that the Judge of the Court of Bankruptcy and Insolvency had no

(a) 9 Ir. Law Rep. 414.

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authority to order the production of Moylan, then a prisoner for debt in the Marshalsea, in order that he should give evidence in that Court. On reference to the 19 & 20 *Vic.*, c. 68, s. 3, it will be seen that that authority was given to the Commissioners of Bankruptcy and the Commissioners of Insolvency. No doubt those Commissioners and their Courts have since been swept away, and a new Court and new Judges have been called into existence for the discharge of analogous functions. It is not necessary here to decide whether the powers which the Legislature thought it necessary to confer on the Commissioners have or have not been transferred to the Judges who are called on to discharge those analogous functions. But assuming that the order was not strictly legal, we are now to see whether an honest obedience to it on the part of the Marshal was such a grave offence against the legal rights and liberties of the applicant as to make his custody thereafter illegal, so as to justify him in calling on this Court for his discharge under the writ of *habeas corpus ab subjiciendum*.

By the 5 & 6 *Vic.*, c. 95, s. 1, the Sheriff of the city of Dublin was thereafter required to lodge his prisoners in the Four-courts Marshalsea, and they were to be there in the custody of the Marshal. I shall not here stop to inquire whether, as laid down in *Ex parte Higgins* (a), such persons were thus placed in the actual custody of the Marshal while they still remained in the legal custody of the Sheriff. I deal with the prisoner simply as one in the actual custody of the Marshal. I find also that the Act 5 & 6 *Vic.*, c. 95, s. 1, declares that "All rules, orders, and enactments now in force respecting the prisoners now in the same prison shall be taken to apply, in all respects, to all the prisoners who shall be confined therein under this Act;" thus placing all the prisoners at all times thereafter on the same footing; or, to apply it to the present case, bringing the prisoners lodged by the Sheriff within the full operation of the 8 *Anne*, c. 7. That Act, after reciting that prisoners in the Marshalsea, "legally committed to the custody of the Marshal had, by corrupt and illegal practices, obtained liberty to escape and go at large, without satisfaction made to the respective plaintiffs

(a) 9 Ir. Law Rep. 414.

“or creditors, to the discouragement of trade, and in defiance to
“the good and wholesome laws heretofore made to restrain such
“abuses,” proceeds to enact that if any such prisoner, before he
shall have made payment or satisfaction to the respective plaintiff
or creditor, shall make any escape from the custody of the Marshal
of the said Courts, or from the prison of the said Marshalsea, it
shall be lawful for any person, upon oath thereof before a Judge, to
obtain an escape-warrant addressed to all Sheriffs; &c., authorising
them to seize and arrest the person so escaped, and lodge him in the
common gaol of the county in which he was arrested, there to
remain until payment of his debt, &c. All this goes far to show
that a constructive voluntary escape which, according to the autho-
rities cited to us in argument, may be said to have been effected
when the officer of the prison had willingly permitted a relaxation
of those securities which the unpaid creditor in the execution
might lawfully have insisted on—that such a voluntary escape gives
the debtor no such right as he contends for here—viz., that his
custody is to be deemed illegal, and that he ought to be wholly
discharged from it, to the manifest prejudice of the creditor as well
as that of the Marshal. Perhaps the conduct of the Marshal may
not have been strictly correct in removing the applicant under his
custody to give evidence before Judge Berwick. If any injury has
been so inflicted on the applicant, he may have redress by an action
*against the Marshal; but, in my opinion, it is not a case in which
we could be called on to give relief to him as a person labouring
under illegal imprisonment, when, if by any undue practice he had
obtained his actual liberty from the Marshal’s custody, it would
have exposed him to immediate re-arrest on an escape-warrant, as
one who was illegally at large.

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In conclusion, I wish to observe that I think the writ was im-
providently issued. There is no question but that, until the removal
under Judge Berwick’s order the applicant was legally imprisoned
for debt; and the cases of persons restrained of their liberty by such
imprisonment are expressly excepted from the Habeas Corpus Act,
56 G. 3, c. 100, s. 1. Whatever relief might have been given by
the Court out of which the *capias ad satisfaciendum* has issued,

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FITZGERALD, J.

The conditional order for a *habeas corpus* was made in this case by the CHIEF JUSTICE and me. We both felt considerable difficulty in granting it, but we did grant it in deference to the Court of Exchequer. In the course of the argument, it has been admitted on all sides that the order of the Court of Bankruptcy was unsupported by any statutory enactment. It was contended that the prisoner was in the legal custody of the Sheriff, though in the hands of the Marshal; and we were referred to *Ex parte Higgins* (a), and some other cases; and if then, he was in the actual custody of the Sheriff, there is nothing to prevent the Sheriff detaining him. Still the question turns on the Marshalsea Act (5 & 6 Vic., c. 95). For twenty-three years a certain interpretation of that statute has been acted upon by at least two of our Courts, that the prisoner is in the actual custody of the Marshal, and the legal custody of the Sheriff. When a prisoner is in custody in the Marshalsea, the practice has been, that subsequent detainers are sent to the Sheriff.—See *Page v. Williams* (b). Furthermore, in this case the Court of Exchequer has determined that *Ex parte Higgins* contained a fair interpretation of this statute. I would not be inclined, upon this motion, to overrule the decision of the Court of Exchequer, and reverse the practice which has prevailed for twenty-three years, when no appeal lies from our decision. I therefore think that we ought not to discharge the prisoner, but leave him to another remedy—an action for false imprisonment, which would be a simple remedy. If I were now called to express an opinion, my strong impression would be, that I could not follow the rule laid down in *Ex parte Higgins*. The Marshal of the Four-courts—that is his proper title—is an officer of this Court. This Act not alone directs the delivery of the prisoners then in the custody of the Sheriff to the Marshal, but also directs that they shall be in the custody and control of the Marshal. If I now were obliged to express any opinion, it

(a) 9 Ir. Law Rep. 414.

(b) 1 Ir. Com. Law Rep. 499.

would be that, when they were placed in the hands of the officer of this Court, and under his custody and control, they were taken out of the hands of the Sheriff. He had performed his duty; and from that moment the prisoners were in the custody of the Court by that of our officer. I think that this simple interpretation would free us from the absurdity that the party is in the legal custody of one man, when he is in the manual custody of another; but I do not express any opinion on it, as there is no appeal from our decision.

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In the course of the case, some questions have been brought before us upon which we are not obliged to express an opinion—*e. g.*, the question whether, where a prisoner had never actually escaped, but only constructively, there was any case where we had discharged him in prejudice of the execution creditor. How much stronger does this appear when we look at the statute of *Anne*? By that statute he does not relieve himself from custody by an escape; but any person can come to the Court and demand his recaption. Mr. *Jellett* says that such an interpretation would take away all escape. We are not embarrassed by that, as long as a man is a prisoner for debt; and the LORD CHIEF JUSTICE has said that he is under an obligation to remain in the custody of the law. I shall not regard it as alarming if the result of this case should be that there is no legal or voluntary escape from the Four-courts Marshalsea.

There is another point in this case not argued here, but which was so much debated in *Page v. Williams* (a)—[See the judgment of Pennefather, B.]

I concur with the rest of the Court in the rule that we should remand the prisoner.

(a) 1 Ir. Com. Law Rep. 499.

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THOMAS WELDON BERRY ADAMS
 v.
 M. MAVRO, DEMETRIUS BASILY, and
 OCTAVIUS VALIERIS.

April 26.

(*Common Pleas*).

Where a sum of money was paid by the plaintiff for the purchase of a floating cargo, upon an agreement, that in case the cargo should, upon its arrival at the port of discharge, be found to contain any damaged grain, such grain should be upon seller's account, and the value thereof returned :

Held,—in an action brought upon this agreement, that such a failure of consideration happening to occur at an Irish port, is a sufficient portion of the cause of action to attract the jurisdiction of the Irish Courts, and enable them to substitute service upon an agent in Ireland.

Adams v. Gerapolo (5 Ir. Jur., N. S. 217) discussed.

THIS was a motion on the part of the plaintiff, that the conditional order for service of the writ of summons and plaint in this matter, upon Mr. Thomas E. Ryan of No. 8 Burgh-quay, in the city of Dublin, the agent of the defendants in this country for the discharge of the cargo, the subject-matter of this action, and transmitting, in a registered letter, a copy of the summons and plaint to the defendants, be made absolute, notwithstanding the cause shown.

The writ of summons and plaint complained that the defendants were indebted to the plaintiff in the sum of £315, money payable by the defendants to the plaintiff, for that by a contract in writing, dated the 23rd of January 1866, the plaintiff bought from the defendants, and the defendants sold to the plaintiff, a cargo of Glurka wheat, shipped at Odessa, *per* "Petro Slava," described as consisting of about 3600 chetwerts, or 2592 quarters, as per bill of lading dated 9th of October 1865, at the price of forty-two shillings, less two per cent. cost of freight and insurance for each and every 492lbs. delivered at any safe floating port in the United Kingdom; and that all sea-damaged grain should be held for the account of the sellers, and also any grain otherwise damaged, to the extent of 150 quarters (slight dry warmth not injuring grain not to be objected to); and that the vessel, which had then arrived at Plymouth for orders, having eleven days from that date to discharge, should be discharged as per terms of charter-party; that the sellers should not be responsible for the correctness of the reports received from the agents at the port of call; and that the invoice should be considered provisional, calculating one hundred chetwerts equal to seventy-two quarters, and computing weight at sixty-one and a-half

pounds per bushel; but in case of any sea accident (pumping up grain wet to be accounted as sea accident), after that date, affecting measure, the provisional invoice should be final; that no charge should be made for damage; and that the sellers should pay the agent's brokerage of one-half per cent; and that payment should be made by cash in London, less interest at the rate of eight per cent. per annum, for the unexpired term of two months from the date of said contracts, in exchange for the bill of lading and policies of insurance effected with approved undertakers, but for whose solvency sellers were not to be responsible; and the plaintiff says that afterwards the defendants furnished to the plaintiff a provisional invoice of the said cargo, by which the price of the said cargo, according to the quantity of wheat stated in the said invoice to be contained in the said cargo, less by certain deductions to which the plaintiff was entitled, and which were allowed by the said provisional invoice, appeared to be a sum £4626. 9s. 3d.; and afterwards and before the said cargo arrived in port, and before the same was delivered to the plaintiff, he the plaintiff, at the request of the defendants, paid to the defendants in cash a sum of £4452. 1s. 6d., less interest on said sum at the rate of eight per cent. per annum, for the unexpired term of two months from the date of the said contract—that is to say, a sum of £4400; and afterwards the said cargo was delivered to the plaintiff, and the plaintiff says that the quantity of wheat contained in said cargo was much less than that specified in the aforesaid provisional invoice (difference not being caused by any sea accident after the date of the said contract affecting measure); and the plaintiff further says, that of the said wheat actually contained in said cargo, and delivered to plaintiff, large portions consisted of sea-damaged grain and grain otherwise damaged (not within the exception in the said contract), and which sea-damaged grain and grain otherwise damaged, to the extent of 150 quarters, the plaintiff was entitled to hold, and did then hold, on the account of the defendants; and plaintiff always has been ready and willing, and still is ready and willing, and within a reasonable time after the delivery to him of the said cargo, offered to deliver the same damaged portions to the

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defendants; and the plaintiff says that, after deducting the excess of the quantity specified in the said provisional invoice over the quantity actually contained in the said cargo, and in fact delivered to the plaintiff, and also deducting the said sea-damaged grain, and grain otherwise damaged as aforesaid, and also the agent's brokerage at the rate of one-half per cent., pursuant to the said contract, the sum paid by the plaintiff to the defendants, on account of the price of the said cargo, exceeded the sum which he should have paid, according to the said contract, by a sum of £307. 7s. 6d., and by reason thereof the defendants became liable to pay and refund to the plaintiff the said sum of £307. 7s. 6d., but have not paid the same, although requested by the plaintiff so to do; and the plaintiff claims the said sum of £307. 7s. 6d.

The writ of summons and plaint also contained counts for money had and received, money paid, and upon accounts stated.

The plaintiff, in his affidavit, verified the facts stated in the first paragraph of the writ of summons and plaint, and stated that the defendants carried on business at No. 112 Gresham-house, Old Broad-street London; that the port at which the cargo was delivered as aforesaid was Dublin; that he was advised that the cause of action arose in Ireland, within the jurisdiction of the Court; that the defendants had no office or place of business in Ireland, but that Mr. Thomas E. Ryan of Burgh-quay, in the city of Dublin, merchant, acted as agent in this country for the defendants in the discharge of the cargo, the subject-matter of the action, and communicated on their behalf with him, the plaintiff, in reference thereto; that plaintiff had had frequent interviews with the said Mr. Ryan, as agent for the defendants, while the vessel was being discharged; and that said Mr. Ryan has for some time been acting as agent for defendants in Dublin, in the superintendence on their behalf of cargoes of corn discharged in this port; that he believes that said Mr. Ryan was in communication with the defendants, and that any summons and plaint, or notice served on him for the defendants, would be at once forwarded by him to them.

Upon this affidavit Mr. Justice Fitzgerald, on the 6th of April 1866, made a conditional order that service of the writ of summons

and plaint in this cause, by serving Mr. Ryan with a copy thereof, and of the order, and similar copies upon the defendants, through the post by registered letter, or place of business in London, be deemed good service, unless cause shown to the contrary within twelve days from said service. Service was thus duly effected on the 7th of April. On the 17th of April affidavits were sworn and filed by Mr. Ryan and Mr. Matthew Anderson, of the firm of Anderson and Lee, attorneys, as cause against the order. Mr. Ryan deposed that he never was employed or acted as agent for or on behalf of the defendants in this country, save on two or three occasions to superintend the discharge and delivery of cargoes of grain in the port of Dublin; and on any of such occasions such agency terminated on the complete discharge or delivery of such cargoes; and that the last occasion on which he was employed by defendants was, to superintend on their behalf the discharge or delivery of a cargo of grain from on board a vessel called the "Petro Slava," in the preceding January (the subject-matter of this action), which delivery was completed on the 15th of February, from which time he had ceased to act for the defendants, and had no further authority to act as agent for them in this country.

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Mr. Anderson, without stating in what capacity he had come forward, deposed that he had received from Messrs. Thomas and Hollams, solicitors, of London, a copy of the writ of summons and plaint, and of the aforesaid order for substitution of service, also a copy of the contract of sale of the cargo of wheat in question, and also some letters and copies of letters which passed between the parties, all which he referred to, and all which he believed and submitted proved that said contract was entirely and exclusively an English contract; and he believed that no part of the money sought to be recovered was paid in Ireland, but that the entire thereof was paid in London.

On referring to the contract of sale, it appeared that it contained a provision that, in case of any dispute between the buyer and sellers, it was agreed by them to leave the same to the arbitration of two London corn-factors, mutually chosen, or their umpire, and to be bound by their decision.

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Dowse and Samuel Walker, for plaintiff.

It is sufficient, in order to maintain the motion, that any portion of the cause of action should have arisen in Ireland: *Kisby v. Chester and Holyhead Railway Company* (a); and in the present case the failure of consideration arising from the non-delivery of the whole cargo in proper condition, was a portion of the cause of action happening within the jurisdiction: *Watson v. Atlantic Royal Mail Steam Navigation Company* (b); *Adams v. Davison* (c); *Reilly v. White* (d).

Palles and Walter Boyd, for Mr. Thomas Ryan.

This is not an action for non-delivery of goods, but, as it were, for money had and received, where the agreement was entered into, and the money paid, in England, and does not therefore fall within the authorities cited on the other side. The present question has been already adjudicated upon in our favour by the Court of Exchequer, in the case of *Adams v. Gerapolo* (e). By the terms of the contract the cargo might have been discharged at any safe floating port in the United Kingdom; and the mere accident that it was discharged in Ireland does not make any difference in the law: *Sichel v. Borch* (f). If the motion be granted, the plaintiff must be put upon terms to confine himself to a cause of action arising within the jurisdiction: *Diamond v. Sutton* (g).

MONAHAN, C. J.

In this case we have had occasion to consider the decision of the Court of Exchequer, in the case of *Adams v. Gerapolo*, as reported in 5 *Ir. Jur.*, N. S., p. 217; and we have come to the conclusion that the judgment of the Chief Baron is that which we ought to follow. We see no reason to doubt the propriety of the decision of this Court, that, if any portion of a cause of action arises in Ireland, service may be substituted upon an agent in this country, without

(a) 6 *Ir. Com. Law Rep.* 393.

(b) 10 *Ir. Com. Law Rep.* 163.

(c) 6 *Ir. Jur.*, N. S. 390.

(d) 11 *Ir. Com. Law Rep.* 133.

(e) 5 *Ir. Jur.*, N. S. 217.

(f) 2 *H. & C.* 594.

(g) *Law Rep.* 1 *Exch.* 130.

reference to whether or not that be the greater or smaller part of the entire cause of action. We mean to abide by that decision; and therefore the question is, whether or not the facts of this case bring it within the rule we have laid down? In this case a sum of money is paid upon the express stipulation that, in case a certain floating cargo should be found to contain any damaged grain upon its arrival at the port of discharge, it should be competent for the buyer to reject such damaged grain, and same should be retained on seller's account. It is therefore an agreement that the money was to be paid back upon the happening of a certain event at a certain place; and that event has happened in this country. It is true that this event might have happened elsewhere. We think, however, that if this event, upon which the failure of consideration was to arise, had not happened in this country, then nothing would have existed to attract the jurisdiction of this Court. Upon looking into the case in the Court of Exchequer, it would appear that this was the distinction which the Lord Chief Baron had in view. The other learned Barons were of a different opinion, and held that they had no jurisdiction. With every deference to their opinion, we agree with that of the Lord Chief Baron, and accordingly make absolute the conditional order.

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Order made absolute.

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Exchequer Chamber.

CATHERINE COLTSMAN, *Plaintiff in Error*;
 DANIEL CRONIN COLTSMAN, *Defendant in Error*.*

April 25.
 June 26.

A testator, seised of lands in fee and quasi fee, by his will devised "all his property, lands, tenements, and premises," at and about the two denominations, and his plate, library, pictures, and furniture, to A. He directed an annuity to be paid to his wife "out of the rents, issues, dividends, interest and profits of my said estates." By a codicil, the testator directed that, "if it should happen that my son A die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs," then his lands of both denominations, charged with the annuity to his wife, and with any reasonable provision A should make for his wife, should, at A's death, descend to his grandson D, who was to take the testator's name in addition to his own. The codicil also declared that, in case of A's death without heirs of his body lawfully begotten or to be begotten, in that case, and in default of such heirs, the testator gave the sum of £6000 to his daughter M. A entered into possession on the testator's death, executed disentailing deeds of both denominations, and died without ever having had issue.

THIS was an action of ejectment on the title, brought by Catherine Coltsman, widow of John Coltsman the younger, against Daniel Cronin Coltsman. The action was tried before MONAHAN, C. J., at the Summer Assizes for the county of Kerry, 1863. It appeared that John Coltsman the elder, who had been seised of Flesk Castle in quasi fee, under a lease for lives renewable for ever, and of Dicksgrove in fee, died in 1835, having made his will and codicil thereto, set forth below. He left surviving him his widow, John Coltsman the younger (his only son), and a daughter Mary, married to Sir William D. Godfrey; another daughter, Christina, who had married Daniel Cronin the younger, had died in the lifetime of the testator, leaving issue, of whom the defendant Daniel Cronin the younger, who afterwards took the name of Coltsman, was the eldest. John Coltsman the younger, shortly after his father's death, executed disentailing deeds of both the above denominations. He died on the 15th of January 1849. By his will, after giving some small legacies, he devised "all the residue of his real and personal estate" to his wife Catherine Coltsman, the plaintiff in this action.

Held, that, under the above devise, A took either an estate for life, or in fee, in both denominations, with an executory devise over to D in fee.

Coltsman v. Coltsman (15 Ir. Com. Law Rep. 171) followed by the Exchequer Chamber. The Judges were equally divided.

* *Coram* LEFROY, C. J., MONAHAN, C. J., KEOGH, O'BRIEN, CHRISTIAN, HAYES, FITZGERALD, and O'HAGAN, JJ.

At the trial, his Lordship directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for her. The will of John Coltsman the elder, upon which the case turned, ran as follows:—"In the name of God; amen. I, John Coltsman, "of Flesk Castle, near Killarney, in the county of Kerry, gentle- "man, being of sound and disposing mind and understanding, do "make and publish this my last will and testament, in manner "following—First; I give, devise and bequeath to my son John "Coltsman all those my property, lands, tenements and premises "at and about Flesk Castle, together with the live stock on said "lands; also my plate, library, pictures, and furniture. I also "devise and bequeath to my son John Coltsman my lands, tene- "ments and premises, with the appurtenances thereof, situate, lying "and being at Dicksgrove, near Castleisland, county of Kerry. "I give and bequeath to my son John Coltsman the money I have "at interest in the lands and estates of Daniel Cronin, my son- "in-law, also the money I have at interest in the lands and estates "of the late Daniel Cronin, his father (the bonds I think are signed "by father and son aforesaid). I also make over and assign to "my son John Coltsman the bond I have of Lord Kenmare for "the sum or bond of £500 sterling. I also give and bequeath "to him the sum of £500 sterling, lent by me at interest to my "son-in-law William D. Godfrey. I give and bequeath to my "son John Coltsman my lands and premises at Caleza de Mon- "tacheque, a few miles from Lisbon; I also bequeath and assign "to him my title and claim to some houses and lands situate "and lying in New-lane, near the South Catholic chapel, in the "city of Cork, the property of the late Doctor Walsh; but which "houses and lands aforesaid the son of the said Doctor Walsh "promised to transfer and assign to me, in payment of a debt "which his father owed me at his death.—I give and bequeath "to my dear wife Christina Coltsman the yearly sum or annuity "of £700 sterling, during her natural life, and for her own use "and benefit, in lieu for and instead of all other provisions made "for her upon or previous to our intermarriage; said annuity to "be paid and payable (into her own hands) *out of the rents, issues,*

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E. T. 1865. *“dividends, interest and profits of my said estates, by half-yearly*
Exch. Cham. *“payments, on the 25th day of March and the 29th day of Sep-*
 COLTSMAN *“tember in every year, by even and equal proportions; the first*
v. *“payment of the same to begin and be made on such of the said*
 COLTSMAN, *“days as shall first happen after my decease: the said annuity to*
“be also paid or payable clear of all taxes and deductions what-
“soever. I also give and bequeath to my dear wife Christina Colts-
“man, the further sum of £1000 sterling, to be paid to her out of
“my said estates, at the end of the year next after my decease, for
“her own use and benefit. I also bequeath to my dear wife
“Christina Coltsman, during her natural life, such part or portion
“of the said plate as she may think proper for her own use, and
“to be returned at her decease to my son John Coltsman, his heirs,
“executors and assigns. I also give and bequeath to her our best
“carriage and carriage-horses, and desire that she shall have suffi-
“cient good and suitable furniture for the rooms she may prefer
“in Flesk Castle for her own use. I bequeath to my daughter
“Mary Godfrey the sum of £300, to be placed in the funds for
“her own use and benefit, and so as that the said sum of £300, or
“any part of it, shall not be liable to the debts, engagement,
“management or control of her husband. I give to my son-in-law
“Daniel Cronin the sum of £100 sterling; also to my son-in-law
“William D. Godfrey the like sum of £100 sterling. I, moreover,
“give and bequeath to my dear wife Christina Coltsman whatso-
“ever part or portion of the household linen she may think proper
“for her own use, and also desire that she may have the disposal of
“by will of the £1000 before mentioned (and bequeathed in this
“will to her), at any time she may think proper after my decease.
“I also hereby constitute and appoint my beloved Christina
“Coltsman executrix, and my son John Coltsman executor, of
“this my last will and testament; hereby revoking and annulling
“all former and other wills and testaments by me at any time
“heretofore made.—In witness whereof I have, to this my last
“will and testament, set and subscribed my hand and seal, 9th day
“of August 1833, &c., &c.—John Coltsman.”

The testator made the following codicil:—"Whereas I, John E. T. 1865.
 "Coltsman, of Flesk Castle, near Killarney, in the county of Kerry, *Exch. Cham.*
 "gentleman, have made and duly executed my last will and testa- COLTSMAN
 "ment in writing, bearing date the 9th day of August 1833; v.
 "now, I do hereby declare this present writing to be a codicil COLTSMAN.
 "to my said will, and I do direct the same to be taken as a part
 "thereof. And I do hereby give and bequeath to my dear wife
 "Christina Coltsman, in my said will named, the further yearly sum
 "of £100, in addition to the annuity I have bequeathed to her in
 "my said will, to be paid and payable into her proper hands, out of
 "the rents, issues and dividends, interest and profits of *all my said*
 "*estates*, by half-yearly payments, in the manner and at the times
 "specified and declared in my said will. I also do hereby give and
 "bequeath to my brother-in-law John Lassener the sum of £100.
 "*And if it should happen that my son John Coltsman die without*
 "*heirs of his body lawfully begotten, or to be begotten, in that case,*
 "*and in default of such heirs,* I do hereby devise and direct that
 "my lands, castles, tenements, and premises, at and about Flesk
 "Castle, and mentioned in my said will, together with the plate,
 "furniture, and library, in said will specified, also my *lands*, farms,
 "tenements, and premises, situate, lying and being at Dicksgrove,
 "near Castleisland, *all* subject to and *charged with* the payment of
 "the aforesaid annuity to my dear wife of £800 a-year, *and also*
 "*with the payment of any reasonable provision made, with my*
 "*consent, by my son for his wife,* to be paid and payable to
 "her during her natural life, *shall, at my son's death, descend*
 "and be transferred to my grandson Daniel Cronin, his heirs,
 "executors and assigns, for ever; the heir for the time being to add
 "the name of 'Coltsman' to the name 'Cronin.' Also, if it should
 "happen that my son John Coltsman die *without heirs of his*
 "*body lawfully begotten, or to be begotten, in that case, and in*
 "*default of such heirs,* I do hereby give and assign, out of the
 "moneys I have at interest, and specified in my said will, the sum
 "of "£6000 to my daughter Mary Godfrey, for her own use and
 "benefit, and so as that the said sum of £6000 shall not, nor
 "shall any part of it, be subject or liable to the debts, engage-

E. T. 1865. "ments, management or control of *her husband*; but, at the same
Exch. Cham. "time, said sum of £6000 shall *be subject to and charged with*
 COLTSMAN "the payment of the said annuity to my dear wife Christina
 v.
 COLTSMAN. "Coltsman. I do hereby give and bequeath to the Reverend
 "Thomas Dunne, Catholic curate of Killarney, the sum of £50,
 "as a testimony of my esteem. I do hereby constitute my daughter
 "Mary Godfrey, and my son-in-law Daniel Cronin, joint executors
 "with those already constituted by me in my said will; and I do
 "hereby ratify and confirm my said will in all other particulars
 "thereof.—In witness whereof I, the said John Coltsman, have
 "to this codicil set my hand and seal, this 6th day of December
 "1833."

The case now came before the Exchequer Chamber on appeal.

D. C. Heron (with whom were *J. O'Hagan* and *Finch White*),
 for the appellant (Mrs. Coltsman).

John Coltsman junior took an estate tail in both Dicksgrrove and Flesk Castle. First, as regards Dicksgrrove, under the will of John Coltsman senior John Coltsman junior took an estate for life in Dicksgrrove; but the introduction of the words "heirs of the body," in the devise of Dicksgrrove in the codicil, enlarged that estate for life into an estate tail, by implication. The intention of the testator to give an estate tail to John Coltsman junior is manifest throughout the will and codicil: *Wyld v. Lewis* (a); *Waller v. Drew* (b). The words "heirs of the body" are characterised by Lord Cranworth as "technical words, almost mysteriously inflexible:" *Ex parte Wynch* (c). The words "at" and "after" my son's death, are synonymous: *Simmons v. Simmons* (d); *Doe d. Cole v. Goldsmith* (e). The principal cases relied upon for the adverse construction of this will and codicil are, *Doe d. King v. Frost* (f), *Ex parte Davis* (g), and *Parker v. Birks* (h). In each of those cases the estate given was an estate in fee-simple; and the words

(a) 1 Atk. 432.

(c) 5 De G., M. & G. 207.

(e) 7 Taunt. 209.

(g) 2 Sim., N. S. 114.

(b) Comyn, 372.

(d) 8 Sim. 22.

(f) 3 B. & Ald. 546.

(h) 1 K. & J. 156.

"heirs of the body" are not used in any of the other cases relied upon. The intention to create an estate tail, whenever the words "heirs of the body" are used, was considered so manifest by the Legislature, that the Wills Act (7 W. 4, and 1 Vic., c. 26) provides for the death of a devisee "*without issue*," but not for his decease without "heirs of the body." An estate for life, followed by a gift over in the event of the tenant for life dying without heirs of his body, confers an estate tail upon him: *Jones v. Ryan* (a); *Moriarty v. Grey* (b); *Broadhurst v. Morris* (c); *Candy v. Campbell* (d); *Beauclerk v. Dormer* (e); 2 *Jarman on Wills*, 3rd ed., p. 494. The codicil here did not give an estate in fee-simple to John Coltsman junior. The word "estate" is merely used as a word of reference, not as a devise: *Randall v. Tuchin* (f); *Doe d. Bates v. Clayton* (g); 2 *Jarman on Wills*, 2nd edition, p. 1229. The words "*at my son's death*" cannot be allowed to control such potent words as "heirs of the body."

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As to Flesk Castle, an estate tail was clearly created. In *Jones v. Ryan* the lands were held in freehold; but the words here are stronger; *The University of Oxford v. Clifton* (h).

John Coltsman junior took an estate tail in both Dicksgrrove and Flesk Castle; whether the remainder to Daniel Cronin Coltsman the defendant) was vested or contingent, is immaterial, as it was barred by the disentailing deed. The codicil deals with both denominations through the words "all my said estates." First, as regards Dicksgrrove, by the first devise thereof John Coltsman junior took only an estate for life. The word "estates" does not enlarge that devise, because the word is used only as reference, and not in the operative clause of the devise: *Doe d. Bruton v. White* (i). The true principle of construction was overlooked by the Lord Chief Baron (j); for, in the first place, when construing a will, the Court cannot take into consideration the fact that John Coltsman junior was the heir of John

(a) 9 Ir. Eq. Rep. 249.

(c) 2 B. & Ad. 1.

(e) 2 Atk. 311.

(g) 8 East, 141.

(i) 1 Exch. 535.

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(b) 12 Ir. Com. Law Rep. 129.

(d) 2 Cl. & Fin. 421.

(f) 6 Taunt. 410.

(h) 1 Eden, 473; S. C., 1 Amb. 385.

(j) 15 Ir. Com. Law Rep. 171.

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Coltsman senior; neither can the Court impute to a testator an intention that one portion of the will is to operate as a devise, and another portion by an intestacy. His Lordship seems also to have overlooked the principle laid down by Shadwell, V. C., in *Mackell v. Weeding (a)*, viz., "That it was a settled point that, whether an estate be given in fee or for life, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail." The reason is plain, because thus the issue of the first taker are most benefitted. In *Dicksgrrove* the Lord Chief Baron gave an estate for life to John Coltsman junior; thus creating an intestacy in the event of John Coltsman junior having left children living at his death, for neither they nor Daniel Cronin would take under the will and codicil. The words "at my son's death" are not used in the restricted sense here; they point merely to the failure of the previous estate: *Peyton v. Lambert (b)*; *Walter v. Drew (c)*. While it is admitted that Daniel Coltsman should take something under the will and codicil, it is clear that he could not have taken anything if John Coltsman junior had left a child which lived for one day after his death. The true canon of construction is laid down in *Prior on Issue*, par. 104, quoted by Wood, V. C., in *Bliceston v. Warburton (d)*:—"That, when there is nothing in the will to give an estate to the issue, or to give the ancestor more than a life estate, words intimating an intention on the part of the testator that the failure of issue should be confined to a limited period shall not have this effect; but, on the contrary, the gift over shall, if possible, be construed as taking effect on an indefinite failure of issue, for the purpose of creating an estate tail in the ancestor." To hold that the testator here contemplated an intestacy as to *Dicksgrrove*, is tantamount to introducing a new canon of construction.

In the devise of Flesk Castle the word "property" is not used in the sense of a gift, but as description. The words "in default of heirs of his body," following an estate for life, create an estate tail

(a) 8 Sim. 4.

(b) 8 Ir. Com. Law Rep. 511.

(c) Comyn, 372.

(d) 2 K. & J. 405.

by implication in the first taker. The phrase "heirs of the body" is called by Sir Matthew Hale "the eye of an estate tail;" and, in a deed, a grant to the grantee, with remainder over in case the grantee die without heirs of his body, gives an estate tail by implication to the grantor: 2 *Preston on Estates*, p. 474.

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The *Attorney-General* (*J. A. Lawson*), the *Solicitor-General* (*E. Sullivan*), *H. P. Jellett*, *G. May*, and *J. C. Neligan*, for Daniel Cronin Coltsman, the respondent in error.

The plain meaning of the language used by the testator is, that the death of John Coltsman, without having heirs of his body, and not an indefinite failure of issue, was the period at which all the estates were to pass over to Daniel Cronin Coltsman. If "without issue" stood in the place of "in default of heirs of his body," it would be impossible to contend that an indefinite failure of issue was intended. There is no technical value attached to the words "heirs of the body," in a will; the intention of each testator in every will is alone to be looked to: *Wilkinson v. South* (a); *Doe d. Sheers v. Jeffrey* (b); *Doe v. Frost* (c); *Ex parte Davis* (d). The words "at the death" require a restricted construction. *Jones v. Ryan* (e) was decided upon two grounds, first, that the word "after" might mean *at his death*; secondly, that there were other limitations in the will which would not permit of the restricted construction. "Die without heirs of the body" must mean the same construction whenever they occur in the will and codicil, as was observed by Lord St. Leonards in *Jones v. Ryan*. *Forth v. Chapman* (f), *Parker v. Birks* (g), and *Wyld v. Lewis* (h), do not bear upon this case. The fact that Mary Godfrey was to receive a personal benefit upon the estate going over to Daniel Cronin Coltsman points to a failure of issue at the death of John Coltsman junior. "Heirs of the body" is no more mysteriously inflexible than "issue;" the phrase may mean either children or remote descendants; when used in the

(a) 7 T. Rep. 555.

(c) 3 B. & Ald. 546.

(e) 9 Ir. Eq. Rep. 249.

(g) 1 K. & J. 156.

(b) 7 T. Rep. 589.

(d) 2 Sim., N. S. 114.

(f) 1 P. Wms. 663.

(h) 1 Atk. 432.

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latter sense, "issue" and "heirs of the body" are synonymous. Here, the words are used to point to the time when the estates should go over. "Property" carries Flesk Castle and all belonging to it. "My lands at Dicksgrove" is equally potent. And the testator, having charged all his estates, in the event of his son dying without issue living at his death, with £6000, for Mary Godfrey's benefit, speaks of both denominations as "all my said estates." *Is re English* (a); 2 *Jarman on Wills*, 3rd ed., p. 251. Both properties are mentioned together; they go over together; therefore John Coltsman junior took an absolute estate in both.

The objection that the restricted limitation of heirs of the body to children living at the death of John Coltsman junior creates an intestacy as to Dicksgrove, is answered by the presumption that, so far from intending to create an intestacy, the testator knew what he was doing, and that his son was his heir-at-law, and that he would inherit Dicksgrove, and could thus provide for his issue if he had any: *Uthwatt v. Bryant* (b); *Doe d. Patten v. Fricker* (c); *Burton v. White* (d). As to the authorities relied on by the plaintiff in error, *Wyld v. Lewis* (e) is either inaccurately reported, or Lord Hardwicke made a mistake, as the construction there given would have disinherited children as well as grandchildren.

In *Doe d. Cole v. Goldsmith* (f), there was an actual gift to the heirs of the body, and the Court refused to cut down the word "heirs" to "children." Here there is no gift to the heirs of the body of John Coltsman junior, direct or implied. The Lord Chief Baron adopted the same principle of construction, viz., he examined the entire scope of the will and codicil, and sought how John Coltsman junior could be most effectually prevented from barring the devolution of both estates. An estate tail in Flesk Castle could not have been given without overruling all the cases in the books: *Lethouillier v. Tracy* (g). The 29th section of the Wills Act has no application to cases in which the words *dying without issue* are

(a) 2 Ir. Com. Law Rep. 284.

(b) 6 Taunt. 317.

(c) 6 Exch. 510.

(d) 7 Exch. 720.

(e) 1 Atk. 432.

(f) 7 Taunt. 209.

(g) 3 Atk. 796.

mentioned with other words, such as *dying under twenty-one*; which additional words, upon the authority of decided cases, modify their meaning: *Morris v. Morris* (a); *Leigh v. Norbury* (b).

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D. C. Heron, in reply, cited *Hawkins on Wills*, p. 132, upon the meaning of the word *estate*.

The LORD CHIEF JUSTICE complimented the Junior Counsel on each side upon the ability with which they had argued the case.

The Court being equally divided in their opinion, their Lordships delivered their judgments *seriatim*.

T. T. 1855.
 June 22.

O'HAGAN, J.

This was an action of ejectment on the title, brought by the plaintiff Catherine Coltsman, to recover from the defendant Daniel Cronin Coltsman two estates situate in the county of Kerry—one called Dicks Grove, and the other Flesk Castle. Flesk Castle is held for lives renewable for ever; and Dicks Grove is held in fee-simple. Both denominations were the property of John Coltsman, who had a son, John Coltsman the younger, and a daughter, Mary Coltsman. He made his will, which bore date the 9th of August 1833, and was in these terms.—[Read the will.]—To this will he added a codicil, bearing date the 6th of December 1833, which was in the terms following.—[Read the codicil.]—In 1835, John Coltsman the elder died, leaving John Coltsman the younger his son, Mary Coltsman his daughter, and his widow, surviving him. Another daughter, who died during his life, married Daniel Cronin, and left several children: Daniel Cronin the younger, otherwise Daniel Cronin Coltsman, the defendant, was her eldest son. After the death of John Coltsman the elder, in the year 1835, John Coltsman the younger executed two disentailing deeds—one as to Flesk Castle, and the other as to Dicks Grove; they both bore date the 7th of July, 1835. There was a reconveyance from David Mahony, the trustee; and under these instruments John Coltsman became absolutely entitled to dispose of the two denominations, if his father's

(a) 17 Beav. 198.

(b) 13 Ves. jun. 340.

T. T. 1865. will and codicil gave him an estate tail in Dicksgrove, and an
Each. Cham. estate *quasi* in tail in Flesk Castle. Being so possessed, he made
 COLTSMAN his will, bearing date the 7th of August 1848, and devised, after
 v. COLTSMAN. several bequests, all the rest, residue and remainder of his prop-
 erty, of every kind and description, whether real, freehold, or
 personal, to his dear wife Catherine Coltsman, her heirs, exe-
 cutors, administrators and assigns, for ever. John Coltsman
 subsequently died; and the ejectment in this cause was instituted
 by his widow Catherine, relying on this residuary devise as enti-
 tling her absolutely to Flesk Castle and Dicksgrove. The record
 came for trial in 1863, before the Lord Chief Justice of the
 Common Pleas, who directed a verdict for the defendant, subject
 to be turned into a verdict for the plaintiff in case the Court
 should be of opinion that the verdict should be so entered. The
 case was argued before the Court of Exchequer, on a motion to
 set aside the verdict and enter a verdict for the plaintiff, in pur-
 suance of the leave reserved; and the Court pronounced judgment
 in sustainment of the verdict, and in favour of the defendant,
 as to both the denominations in question. Against that judgment
 the plaintiff has appealed; and we are now required to decide
 whether it was well founded. It proceeded upon the view that,
 under the will of John Coltsman the elder, and the codicil attached
 to it, in the event which occurred after his death, Daniel Cronin
 Coltsman, the defendant, became entitled to both the denominations
 of Flesk Castle and Dicksgrove. If he was so entitled, both the
 verdict and judgment should be supported as to both. If he was
 so entitled to one, the verdict and judgment will be so far main-
 tainable; but if, on the other hand, John Coltsman the younger,
 under the will and codicil, took a *quasi* estate tail in Flesk Castle,
 and an estate tail in Dicksgrove, or such an estate in either of
 them, then, under the operation of the disentailing deeds, and
 the will of her husband, the plaintiff Catherine rightly claims to
 have a verdict entered for her as to both the denominations, or
 one of them, and that John Coltsman the younger took such an
 estate in tail, or *quasi* in tail.

The case is one of much complexity and difficulty, and well

illustrates the truth of the observation of *Lord Coke*, which has been lately repeated by a learned lord, as indicating his own embarrassment in dealing with a tangled question of the kind:—"Wills, "and the construction of them, do more perplex a man than "any other matter; and to make a certain construction of them "exceedeth *jurisprudentium artem*." I have had great doubt and hesitation in considering the arguments; and I am by no means confident that I have reached the right construction, especially as I am aware it differs from that of some of my Brethren, whose knowledge and experience are far greater than mine, and for whose opinions I have the sincerest respect; but, upon the whole, with the proper diffidence and self-distrust which such a difference should engender, I think that the judgment of the Exchequer was right, and ought to be affirmed.

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Upon the true construction of the will, if it stood alone, I should be of opinion that John Coltsman the younger took the entire estate of the testator in Flesk Castle; but only an estate for life in Dicksgrove. The devise of Flesk Castle gives to John Coltsman "all those my *property*, lands, tenements and premises at and about "Flesk Castle, together with the live stock on said lands." I think that the word "*property*" was sufficient to pass the absolute interest. A series of cases, to which it would be idle to refer in detail, has established that that word, unqualified by the context, will give whatever the testator had. It is enough on this point to refer to *Doe d. Booley and others v. Roberts (a)*, *Nicholls v. Butcher (b)*, and *Patten v. Randall (c)*. I see nothing in this will to prevent the full application of these authorities, and a crowd of others to the same effect; and, therefore, it seems to me that the word "*property*" was sufficient to give John Coltsman junior the *quasi* fee in Flesk Castle. In Dicksgrove, looking to the will alone, I think he took merely a life estate. The devise is, of "my lands, tenements and premises, with the appurtenances thereof, situate, lying and being at Dicksgrove, near Castleisland." Before the Wills Act, words such as these only gave an estate for life;

(a) 11 Ad. & Ell. 1000.

(b) 18 Ves. 193.

(c) 1 Jac. & W. 189.

T. T. 1865. and I have been unable to feel the force of the argument ingeniously
Exch. Cham. founded on the law of the phrase "I also devise," and soforth,
 COLTSMAN prefacing the gift of Dicksgrove, and connecting it with the prece-
 COLTSMAN. dent gift of Flesk Castle; and, as has been alleged, importing that
 the second was given in the same manner, and with the same
 amount and character of estate as the first. It seems to me to
 have no such effect; and I find nothing else, to which reference has
 been made for that purpose, in the provisions of the will, sufficient to
 enlarge the life estate so devised in Dicksgrove.

I come now to consider the codicil, which the testator directs to
 be taken "as a part" of his will. The great question before us
 is—does its language import a gift over on the indefinite failure
 of the issue of John Coltsman, or on the failure of issue living
 at the time of his death? For the purpose of determining that
 question, we are to consider the words employed, and the intention of
 the testator, as it may fairly be gathered from all the parts of the
 will and codicil taken together. In *Throgmorton v. Holyday* (a),
 Lord Mansfield says:—"The testator's intention must be taken and
 "collected from the whole will, and it must prevail, if consistent
 "with law;" and Mr. Justice Wilmot expresses the same view,
 still more strongly:—"The statute only requires a will in writing;
 "but requires no technical words. Therefore, if by sound, not
 "indeed arbitrary, construction, it appears that the intention was
 "to devise a fee, it is immaterial what words are made use of. And
 "all the circumstances and clauses are to be united and taken
 "together in order to collect this intention." And Lord Ellen-
 borough puts the same doctrine more pointedly still in *Doe d. Shall*
v. Patteson (b):—"There are no words of such an inflexible nature
 "as will not bend to the intention of a testator when it can be
 "collected from the context of the will." I do not think that this
 rule of construction has been altered or modified in any subsequent
 cases. What, then, is the effect of the words of the codicil, viewed
 in the light of testator's intention, so far as it is apparent on the
 face of these instruments?

I have said that if the will stood alone, I should be of opinion

(a) 3 Burr. 1618.

(b) 16 East. 474.

that it gave to John Coltsman the younger the absolute interest in Flesk Castle, and only an estate for life in Dicksgrove; and this I should hold, although I am quite satisfied that the testator never contemplated the dedicature, but meant that his entire estate and property in both should go to his only son. I believe that the difference in the form of the devises originated not in any will of his, but in the ignorance or error of the draftsman who prepared the instrument. Still, there are no words indicating intention which would warrant us legally, upon the decided cases, in saying that the will gave more than a life estate in one of the denominations. But when the testator comes to incorporate the codicil with his previous testamentary disposition, he deals with those denominations precisely in the same way. There is no sort of difference in the words applied to the one and to the other; and they afford no pretence for saying that his intention, whatever it may have been, was not, absolutely and in all respects, the same as to both. What was that intention? I believe it to have been this:—John Coltsman the elder, after he made a will, with the purpose, probably, as I believe, of disposing of his entire property, subject to certain charges and outgoings, to his son—certainly with the effect of giving him all that could be given in Flesk Castle—began to consider what might possibly happen, and what, in the result, did actually occur—the death of his son, leaving no children to inherit the estates; and he determined that, in that possible event, those estates should go over to Daniel Cronin. It seems to me to have been his purpose that the absolute interest should belong to John Coltsman the younger only if he left issue living at his death. He fixed the period of the death as that at which the contingency should be ended; and his lands at Flesk Castle and Dicksgrove, with his plate and furniture, should vest in, or, in his own words, “descend and be transferred,” to his grandson. Now, does the codicil contain words from which, in the phrase of Mr. Justice Wilmot, “by sound, and not arbitrary, construction,” such an intention may reasonably be ascribed to the testator? I think it does. The bequests with which the codicil begins are unimportant, but it proceeds.—[Read codicil from words “and if.”]

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Abridged as the devise may be, without altering its effect for the purpose of the argument, it will shortly read:—"And if it should happen that John Coltsman die without heirs of his body lawfully begotten, I devise and direct that my lands at Flesk Castle and Dicks Grove shall, *at* my son's death, descend to my grandson Daniel Cronin, and his heirs." In their plain meaning, those words, even if they could not receive a technical construction from the cases to which we have been referred on the part of the defendant, would seem to contemplate the period of John Coltsman's death, without heirs of his body then living, as that at which he and his heirs should cease to have any interest in the estates, and the whole of them should descend to Daniel Cronin. Upon the restrictive effect of the words "at my son's death" many cases were relied on. I shall refer to two of them—*Doe d. King v. Frost* (a), adopted in and sustained by *Ex parte Davies* (b). In the first, the devise was to a son and his heirs, "provided that if V. should have no children, child or issue, the estate was, *on* the decease of the son," to go over to the heir-at-law. And it was held that the son took an estate in fee, with an executory devise over, should he have no issue living at the time of his death; on the ground that it was the intention of the testator that the period of the death of the son should be fixed for determining whether, according to the event indicated, he should take absolutely, or the property should go over. This appears to be a case very nearly identical with that before us. I shall by-and-by consider the effect of the use of the words "heirs of the body" as contrasted with "children" or "issue" in *Doe v. Frost*. In this case, as in that, the nature of the estate of the first devise, whether it should be absolute, or terminate at a particular time and thenceforward vest in another, was made contingent on the existence of "issue" or "heirs of the body," living at his death. The word used there, in *Doe v. Frost*, is "on," and the word in the codicil "at;" but in *Ex parte Davies* the word was "*at*," and the Vice-Chancellor held that "at" and "on" were identical for the purposes of his decision, which was made in accordance with that in *Doe v. Frost*. I shall not go into any detailed consideration of the

(a) 3 B. & Ald. 546.

(b) 2 Sim., N. S. 114.

cases on this point, which are collected in the last edition of *Jarman on Wills*. Several have been cited for the plaintiff; but I think they will be found distinguishable in some instances by the use of the word "after," which is not, and has not been held to be, of the same effect with the words "at" and "on;" and in others by circumstances compelling a conclusion as to the testator's intention, inconsistent with the operation sought to be given to those words. Are there any such circumstances in this case? Is there any clear indication of intention on the part of the testator that the failure of issue should not be a failure of issue living at his death, but a failure of issue generally, so as to give him the estate tail which he claims, and deprive the defendant of the benefit of the executory devise on which he has relied? If there had been such an indication it might prevail; and the words "at his decease" cannot be allowed to defeat its operation. But it seems to me, that the indication is all the other way; and that, upon the entire codicil, it is reasonably certain that John Coltsman the elder designed to vest both the estates in his grandson immediately on the decease of his son without living issue. He had given by his will his plate, furniture, and pictures to John Coltsman the younger. When he comes to modify that will by the codicil, he gives the "plate, furniture, and library," as specified in his will, to his grandson, "at his son's death" without heirs of his body. If there had been no devise of lands in the codicil at all, and if this bequest of chattels had been the only one contained in it, could any one have fairly contended, under the circumstances which arose, that those chattels did not belong to Daniel Cronin immediately on the decease of John Coltsman the younger? If not, why should it be supposed that he had a different purpose as to the disposition of the realty, "together with" which, and in connection with it, and as ancillary to the devise of it, the plate, furniture, and pictures were bequeathed? Did not the testator mean that the owner of the estates should have the plate and furniture: that they should be enjoyed by the same person, and come into his possession at the same time? On this point the case of *Byng v. Byng* (a) seems of much authority, for it

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(a) 10 H. of L. Cas. 175.

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was held there, that the clear purpose of the testator as to the accessory will be taken to determine the effect of his devise of the principal. In the case before us, the estates were the principal, and the plate and pictures bequeathed were the accessory. In *Byng v. Byng*, the principal given was the Quondom Hall estate to Mary Anne Byng and her children; and the accessory was—"With my mansion-house, furniture, plate, books, linen, Archbishop Cranmer's portrait by Holbein, the Indian cabinet in drawing-room, and striking-watch, and diamond ear-rings and pins, as heir-looms with my estate." And, referring to those words, in giving judgment, Lord Westbury says [p. 176]:—"If there be a clear description of the manner in which the accessory is to be held and enjoyed, and the accessory is an inseparable incident to the principal, the light derived from the directions given with regard to the accessory may with propriety be used for the purpose of clearing the testatrix's intention with regard to the enjoyment of the principal. It would be manifestly impossible, and repugnant to the intention of the testatrix, that the accessory should be enjoyed in the one way, the principal in another." The application would seem not inapplicable to this case, in which the devise is of the real estate, "*together with*" the plate, furniture, and library. In *Byng v. Byng* there was also the circumstance that the devisee was required to take a particular name; and this was much relied on by Lord Cranworth and Lord Kingsdown as indicating intention: and so, in the case before us, the codicil, after providing that the lands and chattels should descend to Daniel Cronin "his heirs, executors and assigns, for ever," requires that the heir, for the time being, shall add the name of "Coltsman" to the name of "Cronin." Is not this an indication of intention to guide and restrict the devolution of the property in a particular way and to a specified person? Daniel Cronin was to take the plate and pictures, and he was to assume the name of the testator. The plate and pictures were to pass with the lands, and the name was to be taken by the possessor of both. Do not these circumstances go far to show that the design of the testator in framing his codicil was to put an end, so far as he could, to the uncertainty in which the will left

the destination of the property after the death of John Coltsman the younger, if he should die leaving no children, and to leave a specified representative of John Coltsman the elder in the person of his grandson, who should at once retain the family plate, and pictures and library, and assume the family name, and so maintain the family's credit and importance in the country, which he could not do without also enjoying the family estates, and occupying the family mansion. These circumstances appear to me to be pregnant and persuasive on the question of intention. There is another, which seems even more so. After providing for the addition of the name of "Coltsman" to that of "Cronin," the codicil proceeds:—"Also, if it should happen that my son John Coltsman die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign, out of the moneys I have at interest, and specified in my said will, the sum of £6000 to my daughter Mary Godfrey, for her own use and benefit." The testator's view was plainly this, that, whilst he did not think fit to burden his son with this charge of £6000, he might properly secure it to his daughter, in the event of his grandson succeeding to the estates. Now, upon the construction for which the plaintiff contends, when would the £6000 have become payable? If the failure of issue be held to mean a failure of issue generally, and not a failure of issue living at John Coltsman's death, at what period could this bequest be claimed by my Lady Godfrey? On the defendant's construction, the time of its vesting in her was fixed, and was the very time at which reasonably the testator might have wished that vesting to take place. The bequest is considerable and important; and it is hard to conceive that he designed to give such an effect to the will as would disentitle his daughter indefinitely to the enjoyment of his bounty; yet that would seem to be a consequence flowing from the construction which I decline to adopt, unless other distinct and contradictory interpretations be put on the same words in the same clauses. There is another circumstance still, which, though, perhaps, of less account than that to which I have last adverted, should not be altogether overlooked. The testator, contemplating the death of John Coltsman the younger, without children,

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authorises him to charge the estates with any reasonable provision, to be paid and payable to his wife during her natural life. She is the plaintiff in this action; and it may be worth a thought how far we shall accord with the intention of the testator, in holding his words to have had such an operation that his son was enabled to give away absolutely from his grandson the very property on which he unequivocally declared his purpose to be, that she should only have a life charge, at his son's discretion, and with his own assent. The matters to which I have adverted present, to my mind, accumulated evidence that the general intention to be gathered from all the provisions of the codicil is far from conflicting with the construction which I think should be given to the words "at my son's death," and is in perfect harmony with that construction, and furnishes powerful support to the argument in favour of it. On the whole, therefore, I am of opinion that, both as to Flesk Castle and to Dicksgrove, the true operation of the will and codicil vested the entire estate in Daniel Cronin Coltsman, on the death of John Coltsman the younger without children living at that time. And I have reached this conclusion as to both the denominations, concurring fully with the Lord Chief Baron, in his judgment in the Court of Exchequer, that it is impossible to apply a different rule to Flesk Castle and to Dicksgrove. They are, as there said, differently dealt with by the wording of the will—I think unadvisedly, and against the purpose of the testator; but, when he comes to make his deliberate and final disposition in the codicil, the distinction vanishes, and they are disposed of evidently in the same way, in the same clause, and by the same language. The codicil is incorporated with the will; and, reading them together, I see no possibility of holding that the intention is not clear to do with the one whatever was to be done with the other; and, this being so, and as it is manifest that that intention, if I interpret it aright, cannot be carried out unless the same absolute interest, determinable on the same contingency, was given in both the denominations, it becomes proper to consider whether, even in the absence of express words as to Dicksgrove, there may not be a reasonable and legal ground for implying a gift of more than the life estate, which—and which

only—passed under the will. “The proper and technical mode of
 “limiting an estate in fee-simple,” says Mr. *Jarman on Wills*,
 “2nd ed., p. 253, “is, to give the property to the devisee and his
 “heirs, or to him, his heirs and assigns, for ever; but such an estate
 “may, even under wills made before 1838, be created by any ex-
 “pressions, however informal, which denote the intention.” Or, as
 it was well put, in one of the later cases, in reference to some of the
 authorities to which I shall immediately refer, “There is no rule of
 “law which prevents the Court from giving a fee, where no words
 “of limitation are used, if the intention of the testator to give an
 “absolute interest can be collected from the other parts of the will.”
 The whole of the observations I have made, as to the general drift and
 purport of the codicil, come in aid of the construction which would
 enlarge the life estate in Dicksgrrove given by the will, upon the
 implication arising from its clear expression of an intention in the
 testator which it might be impossible to carry into effect, if such an
 enlargement were not to be made. For, a difficulty, which does not
 seem to have been suggested in the Court of Exchequer, and was
 not much pressed at the Bar before us, might be deemed to arise on
 the assumption that, taking the will and codicil together, we could
 find no ground for holding that John Coltsman the younger took the
 entire estate in Dicksgrrove as well as in Flesk Castle. If he did not,
 it might be contended that, as he had only a life estate in the first
 denomination, with a contingent remainder to Daniel Cronin, the
 reversion remaining in himself, in the circumstances which arose,
 the interests were merged, the remainder was discharged, and his
 will took full effect, in disposing at least of Dicksgrrove. But this
 difficulty will be removed, if we can hold that the absolute property
 went to John Coltsman the younger,—under the will expressly in
 Flesk Castle, and under the will and codicil, by implication, in
 Dicksgrrove. And the reasoning from intention for that purpose is,
 I think, sustained by the consideration that, if John Coltsman took
 a life estate only in Dicksgrrove, and if he had died leaving children,
 there would have been an intestacy in their regard, *quoad* that
 denomination; and they would, so far, have been left without pro-
 vision—a result to be avoided, if that can reasonably be done. But,

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T. T. 1865. further, the view I am putting as to the enlargement of the life
Esch. Cham. estate by implication, appears to me to be sustained by a series of
 COLTSMAN cases which determine that the fee may pass without express words,
 v. where the devise to one person is followed by a gift absolutely to
 COLTSMAN. another, if the devisee should die under the age of twenty-one years.
 In such circumstances, the first devisee is held to take the fee. I shall
 only refer to the names of some of those numerous cases, beginning
 with *Purefoy v. Rogers* (a), by which this rule of construction is
 established. That case was followed by *Moore v. Heavenan* (b);
Throgmorton v. Holliday (c); *Doe v. Cundall* (d); *Tuomy v.*
Barnes (e); *Marshall v. Hill* (f); *Spry v. Bromfield* (g); *In re*
English (h). And the rule has been extended from time to time, so
 that any age may be regarded as well as that of majority; and other
 contingencies may be contemplated along with that of death—as, of
 the devisee dying a minor, and without lawful issue: *Tuomy v.*
Barnes. And, finally, it seems to me to have been applied with-
 out reference to death under any age at all, and in connection with
 wholly different circumstances. In *Hutchinson v. Stephens* (i), in
 which the testator, Harry Wilkinson, gave all his lands, and the
 residue of his personalty, to trustees, in trust to the use of his
 grandson, Henry Tripp, for life, and, after his decease, in trust
 for the child and children of Henry Tripp, at his or their ages
 of twenty-one, as tenants in common; but, in case Henry Tripp
 should happen to die without leaving any lawful issue of his body
 living at the time of his decease, then to persons whom the will spe-
 cifies. Upon that devise Lord Langdale held “that, in the events
 “which happened, his daughter, and only surviving child, having
 “died in his lifetime, the personal estate belonged to the personal
 “representative of the daughter, and the real estate vested in her
 “heir-at-law. The intention of the testator,” his Lordship is re-
 ported to have said, “appeared to be, to make a provision by way

(a) 2 Saund. 188.

(b) Willes, 142.

(c) 3 Burr. 1628.

(d) 9 East, 400.

(e) 10 East, 460.

(f) 2 M. & S. 608.

(g) 7 M. & W. 541.

(h) 2 Ir. Com. Law Rep. 284.

(i) 1 Keene, 240.

"of settlement *for the family of Henry Tripp*, and that construction "would effectuate his intention." Now that case and the present, in the view I shall endeavour to present, as to the words "heirs of the body," as used in the codicil, are very like; and the rule of construction to which I have adverted appears to have been adopted in it.

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It seems to me, therefore, that the principle of *Purefoy v. Rogers* and *Doe v. Cundell* may be applied to the case before us, and that the absolute interest in Dicksgrove may be held to have vested in John Coltsman junior by implication; and that thus we may avoid the difficulty suggested, and, in Lord Langdale's words, "effectuate the intention of the testator."

A great deal of reliance has been placed by the plaintiff's Counsel on the use of the words "die without heirs of his body lawfully begotten, or to be begotten," and "in default of such heirs," which are said to have established an estate tail by implication. It is contended that these words have a definite technical meaning, which we are bound to attach to them; that they are endowed with a "mysterious inflexibility," which prevents them from being moulded in adaptation with any development of intention on the testator's part; although, if "issue" were substituted for "heirs of the body," John Coltsman the younger would have taken the fee, with an executory devise to Daniel Cronin. Certainly no case has been cited precisely supporting the view of the defendant's Counsel upon this point; but then no case has been cited precisely supporting the view of the plaintiff. The collocation of the words is peculiar. There is no gift to the "heirs of the body," as in *Doe v Goldsmith (a)*, and *Doe v. Rucastle (b)*, and other cases which have been cited, and which, on that account, do not govern the present. I am not aware of any authority which determines that the words "heirs of the body," *used as they have been in the codicil before us*, are to be taken to have so masterful a meaning that they must overbear the evidence of intention, however clear and strong. They are stated by Lord Cranworth to be of "mysterious inflexibility;" but Lord Ellenborough says, in the passage I have already quoted, as if to anticipate that argument,

(a) 7 Taunt. 288.
 VOL. 17.

(b) 8 C. B. 876.
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that "*no words* are of such an inflexible nature as will not bend to the intention of a testator." In some of the cases, "issue" has been held identical with "heirs of the body;" and I see no reason why "heirs of the body" may not be held, for the purposes of this argument, identical with "issue," especially as they are used only in the description of a contingency to be provided for, and not as indicating expressly the takers of a gift. It is, no doubt, a settled canon of construction that, when a devise may have effect as a remainder, it shall not operate as an executory devise; but, in a case like this, where there are no words that seem to exclude the latter operation, the question between the remainder and the executory devise becomes a question of intention; and, so considering it, I think there is ample reason to warrant us in holding that Daniel Cronin did take under an executory devise. We are asked, in the admitted absence of any words giving an express estate tail, to say that it must be taken to exist by implication; but, in my view, it is enough to say that I see no ground for holding that any such implication is necessary upon the terms of the codicil; and I do not think we should strain those terms, or be asked to draw from them an inference, for the purpose of defeating what I believe to have been the clear intention of the testator. If we are to make an implication, we should make it to help, and not to harm—in union with, and not in opposition to the purpose which he sought to accomplish. "Implication" has been said to be such a strong probability, that an intention to the contrary cannot be supposed: 1 *V. & B.*, p. 466; and Lord Mansfield described a necessary implication as that "which leaves no room for doubt." In the case before us, I think there is no such "probability" to ground the implication. I believe that the contrary intention may not merely be supposed, but has been not indistinctly expressed; and I am very sure that, at the lowest, there is no such freedom from doubt as would make the implication "necessary."

I think therefore, upon the whole, that the construction for which the defendant contends should be put upon this will and codicil; that that construction is consistent with the legal effect of the words which they contain, and the legal principles in the light of which

we are bound to consider them, that it is in full accordance with the intention of the testator, as I understand it—harmonising the provisions he has made, and giving effect to every one of them; whilst the opposite construction appears to me to be antagonistic to that intention—to render the dispositions of the codicil (*e. g.*, as to the plate and library, and the taking of the testator's name) unreasonable; to erase from it some of its most significant words ("at my son's death"), and to nullify the most important bequest which it contains.

I agree, therefore, with the judgment of the Court of Exchequer. I think the direction of the LORD CHIEF JUSTICE OF THE COMMON PLEAS was right, and that the verdict for the defendant should be sustained.

FITZGERALD, J.

The case is one of some novelty and more than ordinary difficulty, and in which I have felt myself quite overwhelmed by the deluge of authorities with which we have been inundated. I offer my opinion with the utmost doubt and hesitation. For the purposes of my judgment, I adopt the construction of the will acted on in the Court of Exchequer—*i. e.*, that if the will stood alone, without the codicil, the testator thereby gave to his son his whole interest in the lands of Flesk Castle, and an estate for life only in the lands of Dicksgrove. It, however, admits of some question, whether the devise of Flesk Castle gave a greater estate than for the life of the devisee, having regard to its peculiar language and its subject-matter, embracing personalty as well as real estate. In that particular, as well as in the absence of the word "in" after "property," it differs from *Bentley v. Oldfield* (a), principally relied on in the Court below. The question in the cause is as to the operation of the codicil on the previous devises contained in the will, and seems to be whether the true construction and effect of the codicil is to enlarge, by implication, the life estate given by the will in Dicksgrove, into an estate in fee, and engraft on the devises of the two estates an executory devise over to the testator's grandson (the

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(a) 19 Beav. 225.

T. T. 1865. defendant), or to enlarge, by implication, the life estate in Dick-
Exch. Cham. grove into an estate tail, and reduce the greater estate in Flesk Castle
 COLTSMAN to an estate *quasi* in tail, with a remainder over as to both in
v. COLTSMAN. favour of testator's grandson.

The arguments on both sides have been arranged and contrasted with such admirable clearness by the Chief Baron in his delivering the judgment of the Court below, that it would be affectation in me now to review them, and I prefer stating shortly the conclusions I have arrived at, after much and anxious consideration:—First, as to Dicksgrove. It seemed to me, at the opening of the case, a matter of doubt whether, inasmuch as the devisee for life was also testator's heir, any increase of his estate should be implied, but it was conceded in the argument before us, although denied in the Exchequer, that the effect of the codicil was to enlarge by implication the previous life estate in Dicksgrove into a greater estate, the controversy being whether that greater estate was an estate in fee or an estate tail. The testator, by the codicil, provides that, "If it should happen that my son John Coltsman die *without heirs* "of his body lawfully begotten or to be begotten, in that case, and "in default of such issue, I devise," &c. &c. I have been unable, during the argument or since, to get over the force and effect of these words. Whether we take them in their ordinary and popular sense, or according to technical and legal interpretation, they indicate and express an estate tail. The legal sense and meaning of the words "*heirs of the body*" is so settled, so firmly established, as to have become one of the land-marks of title, and not to be departed from unless on clear and unequivocal evidence indicating an intention that they are to be interpreted in another sense. If, therefore, an estate is to be implied from the language of the codicil, and if there is nothing in the codicil to control the construction of the words I have read, it seems clear to me that the estate to be implied is an estate tail. An estate by implication arises entirely from implied intention; and if there was no more in the codicil, there could be no doubt but that the testator intended, by the will and codicil, to provide for the issue of his son in

infinitum; that is to say, that all the posterity of his son should take *under the will, in succession*.

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It has been urged, however, on the part of the defendant, that the subsequent words of the codicil, "*shall, at my son's death,*" descend and be transferred to my grandson Daniel Cronin," &c., control the legal effect and settled meaning of the prior words, "die without heirs of his body lawfully begotten," and "in default of such heirs," and authorise and require us to infer an intention on the part of the testator to give the estate in fee to his son; and so that the posterity of the son would take nothing under the devise.

It seems to me that there is great difficulty in thus controlling the effect of words which, in their ordinary and settled sense, so appropriately express an estate tail. We ought not to do so unless the testator has plainly indicated an intention inconsistent with an estate tail being implied from the use of the words in question.

I have been unable to yield to the defendant's argument, although I have struggled to do so; and I am of opinion that, in order to intercept the ordinary import of the words "heirs of the body," some more clear, unequivocal and persuasive evidence of intention must be found than exists in the present codicil. It appears to me, therefore, that, on the true construction of the will and codicil, John Coltsman took an estate tail, by implication, in Dicks Grove, with remainder over to the defendant on an indefinite failure of issue at the death of John Coltsman. When once we have reached the conclusion that an estate tail was given to the first devisee, the words in the gift over, "at my son's death," become words of limitation after an estate tail, and that limitation over cannot be construed to be an executory devise. The gift is limited to take effect on the expiration of an estate tail, *at the death of the tenant in tail*, and is a contingent remainder.

The defendant further relied on the terms of the bequest of £6000 to Mary Godfrey, and no doubt it creates much difficulty; for, if the same words are to receive the same interpretation in the latter bequest, the gift to Mary could not take effect. There is, however, high authority that the same words, although in the one bequest, may receive a varying construction, according to the nature

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Exch. Cham. where, in a devise over of freeholds and a leasehold, the Lord Chan-
 COLTSMAN cellor, on appeal, held that, as to the freeholds, the words "*die*
v. *without leaving issue*" should be construed generally, by which
 COLTSMAN. there might be at any time a failure of issue; but with respect
 to the leaseholds, the same words should be construed to mean
 "dying without issue living at their death;" "*ut res magis valeat*
quam pereat." In *Shopfield v. Orrery* (b), Lord Hardwicke so far
 approves of *Forth v. Chapman*, and added:—"I think it very
 "reasonable to take words in a different sense, with regard to the
 "different estates, to support the intention of the party; and again,
 in *The Earl of Stafford v. Buckley* (c), he adopts *Forth v. Chap-*
man as an express authority on the same point. In *Peyton v.*
Lambert (d), Mr. Justice O'Brien says:—"It has been decided in
 "*Forth v. Chapman*, and other cases, that where real and personal
 "estate are devised in the same clauses, and in the same terms, a
 "different construction may be given to the words '*dying without*
 "*issue*,' as regards the real estate, from that which is given to them
 "as regards the personal estate."

And now, as to the estate of Flesk Castle, the question is, whether the absolute interest given by the will is to be converted into an estate tail. After much fluctuation of opinion, I have reached the conclusion that the true construction of the codicil is, to consider it as indicating the testator's intention that the previous general gift should be reduced to an estate tail. In arriving at this conclusion, I am not influenced by the argument that the testator intended that the two estates should go together. That argument is put very powerfully by the Chief Baron in the opposite view, but it is a two-edged sword, and therefore fails. The reasoning which has led me to the opinion that the testator intended that his son should take an estate tail in Dicksgrrove seems, if well founded, to reach equally the conclusion that his son was to have but a similar limited estate in Flesk Castle. I have felt greatly pressed by the cases of *Doe v. Frost*, *Ex parte Davies*, and *Parker*

(a) 1 P. Wms. 663.

(b) 3 Atk. 288.

(c) 2 Ves. 180.

(d) 8 Ir. Com. Law Rep. 509.

v. *Birks*, which were so strongly relied on for the defendant. But as to these cases, it is to be remembered that there was in each of them a devise to the first taker *expressly in fee*, and then a gift over; and in none of them is the gift over on failure of "*heirs of the body lawfully begotten*." In *Parker v. Birks* the Vice-Chancellor repeatedly directs attention to the fact that the first gift was a *clear and express gift in fee* to Wm. Shaw, his heirs and assigns; the gift over was "in case Wm. Shaw should die without child or children of his body lawfully begotten." The Vice-Chancellor, after reviewing the authorities with great minuteness, thus concludes:—"It would be a singular construction if I were to hold that William Shaw, taking this estate in fee-simple, on which I cannot engraft a remainder, but every limitation over upon which must be an executory devise, I must first cut down his estate in fee to an estate tail, in order to enable me to decide that the gift over is simply a remainder upon such estate tail, created by the anterior devise. I think, therefore, that I must decide according to the authorities of *Doe v. Frost* (a) and *Ex parte Davies* (b); and, having regard to the clear gift in fee-simple to William Shaw in this case, that the true construction of this will is, that he took an estate in fee-simple, subject to an executory devise over on his death, if he should die without issue. The case is free from the difficulty felt in *Wyld v. Lewis* (c), because William Shaw takes a clear estate in fee, which he can give to his issue, if he should die without children, but leaving grandchildren."

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In the present case there is no express devise to John Coltsman in fee. There is a gift in which the word "property" occurs, and, if uncontrolled, it is sufficient to pass the whole of the testator's interest; but, when the will and codicil are taken together, it gives way before the expressions "heirs of his body lawfully begotten," and is controlled and limited in its operation.

It was observed, in the course of the argument, that no estate tail was created in express terms by the will or codicil; and it was

(a) 3 B. & Ald. 546.

(b) 2 Sim., N. S. 114.

(c) 1 Atk. 432.

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urged that, by the language of the gift over, the testator intended only to mark out and define a class of his posterity on the failure of which in the lifetime of John Coltsman the estate was to go over.

If this argument was well founded, it would seem to follow that there was no sufficient ground to imply any increase or diminution of the interest given by the will to John Coltsman. The case would stand thus: devise of Flesk Castle to John Coltsman absolutely, for the whole of testator's interest; and, there being nothing to reduce that devise to an estate tail, the gift over at his death without any heir of his body, should be considered to be an executory devise; devise of Dicksgrove to him for life; the inheritance in fee descending on him as in case of intestacy; the gift over necessarily being a remainder, and defeated by the conveyance of John Coltsman operating to destroy the particular estate on which it rested.

The plaintiff's Counsel, in the argument before us, and in the Court below, relied on the rule that, where a contingency is created to depend on an estate of freehold capable of supporting a remainder, it shall be construed to be a contingent remainder, and never an executory devise; but this ceased to be a *petitio principii*, for the point to arrive at is, whether John Coltsman took an estate in fee or in tail; if in fee, the gift over must fail, if not held to be an executory devise; but, if once we come to the conclusion that he was tenant in tail, then the other consequences follow as of course.

Upon the whole, my opinion is that, by the combined effect of the will and codicil, John Coltsman took in both properties an estate tail, and that the gift over was a remainder after the estate tail, which has been defeated by the operation of the disentailing deed. I have come to this determination with great regret, because though it seems to me clear that the testator intended to limit an estate tail to his son and his posterity, yet by such a construction the ultimate object which the testator had in view will be defeated. We cannot, however, suffer our judgment to be affected by the consideration that the law enables a tenant in tail to bar the entail and all remainders over.

In my opinion the judgment of the Court of Exchequer should be reversed.

HAYES, J.

The question we have here to solve is, what estate did John Coltsman junior the testator's son, take under the will and codicil of John Coltsman the elder, in the lands of Flesk Castle and Dicksgrove? The testator begins his will by saying :—" I give, devise, "and bequeath to my son John Coltsman all those my property, "lands, tenements and premises, at and about Flesk Castle, together with the live stock on said lands ; also my plate, library, "pictures, and furniture." It seems to have been agreed by Counsel at both sides that this word "property" has the effect of conveying the whole of the testator's estate and interest in that which is the subject of the devise. No doubt there is a long list of authorities tending to that conclusion ; but, bearing in mind the language of Lord Ellenborough, in *Roe v. Pattenon* (a), that "There are no "words of such an inflexible nature as will not bend to the intention "of a testator, when it can be collected from the context of his will," and marking that all the words with which it is associated are used to denote the articles and things which form the subjects of a devise or bequest, rather than the extent or limits of that devise or bequest, I am disposed to think that the expressions used conveyed only a life estate in the Flesk Castle lands. From the absence of all words of inheritance, I infer that a life estate has also been conveyed in the Dicksgrove lands ; so that, by this mode of construing the will, and according to the manifest intention of the testator, a similar estate is given in both denominations to his only son and heir, and principal object of his bounty. Such is the effect of the will ; it makes, among other things, this provision for his son, and leaves merely a legacy of £100 to his grandson Daniel Cronin. Let us now pass to the codicil, made in four months after, and which he desires shall be taken as a part of his will. The testator thereby directs that "If it should happen that my son John Coltsman die without heirs "of his body lawfully begotten, or to be begotten, in that case, and "in default of such heirs, I do hereby devise and direct that my "lands . . . shall, at my son's death, descend and be transferred to my grandson Daniel Cronin, his heirs, executors and

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(a) 16 East, 221, 222.

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"assigns, for ever." Reading these words in connection with the language of the will already adverted to, there appears to me quite sufficient, by implication, to raise the estate devised to John Coltsman from an estate for life to an estate tail, or *quasi* in tail. I think it plainly the intention of the testator that the two estates were to continue in the family of John Coltsman so long as any of his descendants were in being, and that they should not go over until the estates were spent by an indefinite failure of issue or heirs of his body, whenever that might occur. In the case of *Doe v. Frost* (a) Bayley, J., lays down the rule thus:—"If the Court see, by the whole frame of the will, that the estate is to continue in the first devisee so long as he has any lineal descendants, it will follow that the gift to him is of an estate tail." I have said that, in my opinion the estate in Flesk Castle that was given by the will was an estate for life; but, even though the word "property" was held to carry the fee, the result would not be different; for I find, in the same case, Holroyd, J., laying it down as clear, that if it appeared by the subsequent limitation that the estate was to go over upon an indefinite failure of issue, the previous estate *in fee* given would be converted into an estate tail. The same principle is thus laid down by Shadwell, V. C., in *Machell v. Weeding* (b), where he says:—"I consider it to be a settled point, that whether an estate be given in fee or for life, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail." In most of the cases of estate tail by implication, the words used are "issue," rather than "heirs of the body." But that there is no essential difference between the two is plain, from the case of *Goodright v. Goodridge* (c), where, after a devise to his wife for life, the testator said:—"If my son Richard happen to die without *heirs of his body*, my son John shall enjoy my lands;" and it was there held as undoubted that Richard was tenant in tail. I cannot better close my observations on this part of the codicil than by citing the words of Lord Eldon, when giving judgment in the House of Lords, in the celebrated case of *Jesson v. Wright* (d), and which have special

(a) 3 B. & Ald. 555.

(b) 8 Sim. 4.

(c) Willes, 369.

(d) 2 Bl. 55.

' this case. He says:—"On the whole, I
 or intended that all the issue of Wil-
 should go over according to the
 such a decision is necessary,

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ent intention, we enable
 and particular intent.
 law than to pro-
 But to proceed —
 that my son die without
 , or to be begotten, in that case
 I devise and direct that my lands,
 castle, also my lands, &c., at Dicksgrove,
 and with the annuity to my wife, and also with
 my reasonable provision made with my consent by
 his wife during her life, shall, at my son's death,
 and be transferred to my grandson Daniel Cronin, his
 heirs executors, and assigns, for ever. Also, if it should happen
 "that my son die without heirs of his body, in that case, and in
 "default of such heirs," &c. The testator then proceeds to dispose
 of certain parts of his personal estate.

It has been argued for the defendant that, under these words, the
 defendant took a fee or *quasi* fee in Dicksgrove and Fleak Castle by
 way of executory devise; and as such a devise would be unaffected
 by the disentailing deed that has been executed, that he would now
 be entitled to our judgment; but I have arrived at a different con-
 clusion. As I have already said, I think John Coltsman junior took
 an estate tail or *quasi* in tail, by implication; and I think it was not
 until the natural determination of that estate that the devise to
 Daniel Cronin was to vest in possession. The testator says that, in
 case certain events shall happen, then the estate shall at his son's
 death descend and be transferred to Daniel Cronin, his heirs, &c.
 Now what are these events? First; John Coltsman dying without
 heirs of his body; and, secondly, in default of such heirs. Now,
 these two events, if two we may call them, instead of exercising an
 independent influence on the continuance of the estate tail, so as by
 their happening to bring it to any abrupt or unnatural conclusion,

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COLTSMAN. are only to be regarded as the mears and bounds which mark the extent and natural limits of the estate tail. In support of the defendant's case, *Doe v. Frost* (a) has been strongly relied on. There the testator, after devising the lands of Brinkley to his son William in fee, and charging them with an annuity for his (the testator's) wife, declared that, if his son should have no issue, the said estate was, on his (the son's) decease, to become the property of the heir-at-law, subject to such legacies as his son William might leave to the younger branches of the family. In giving judgment, Abbott, C. J., says it was "the plain intention of the testator that, at "the period of the decease of his son William, it should be ascertained whether the estates devised to him by the will should then "vest in him in fee absolutely or pass over to some other person;" in other words, it should then be known whether the event had happened which, by derogating from the previous devise in fee, was to make way for the devise to the person who should then be the heir of the testator.

I, therefore, think that, according to the true construction of the will and codicil, Daniel Cronin took as remainder-man after the estate tail, and not by way of executory devise; and that our judgment ought to be for the plaintiff.

CHRISTIAN, J.

The opinion which I have formed, after some hesitation, is, that the plaintiff is entitled to have the verdict entered for him as to both estates; and, consequently, that the judgment of the Court of Exchequer should be reversed. Though differing thus in the final result, I nevertheless concur, to a considerable extent, in the views which were taken in the Court below, as expressed in the judgment of the Lord Chief Baron; and it will greatly help to the making clear my own view of the case, that I should begin by stating the point in which I agree, and those in which I differ with the Chief Baron:—

First; I concur entirely in the construction put upon the will. I have no doubt that, if the codicil had never been made, John

(a) 3 B. & Ald. 546.

Coltsman the younger would, under the will, have taken the absolute interest in Flesk Castle, and an estate for his life only in Dicksgrove; whilst as to the reversion in the latter, there would have been an intestacy. This is, I think, made abundantly clear by the reasons and authorities assigned by the Chief Baron, to which I refer. But as John Coltsman the younger was the testator's heir-at-law, the reversion in Dicksgrove would have descended on him, and thus, practically (if the codicil had not been made), he would have taken both estates absolutely.

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Secondly; I concur also with the Chief Baron that if the word "issue" had been used in the codicil instead of "heirs of the body," and if the two instruments were conversant with Flesk Castle only, the effect of the codicil would have been to engraft, on the *quasi* fee given by the will in that denomination, an executory devise to Daniel Cronin, in the event of John Coltsman not leaving any issue living at the time of his death. The case would, upon the assumptions I have made, be governed by *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Birks*.

Thirdly; I agree again with the Chief Baron in what was obviously his opinion—[See page 190 of his judgment]—namely, that if the will and codicil were conversant with Dicksgrove only (and even assuming still that the word were "issue," not "heirs of the body"), that the cases last mentioned (*Doe v. Frost*, and others) would *not* have applied. The reason is the, to my mind, unanswerable one assigned by the Chief Baron, which had been acted on by Lord Hardwicke in *Wylde v. Lewis* (a), and laid down in s. 104 of *Prior on Issue*—approved by Vice-Chancellor Wood (b),—namely, the absurdity of making the transfer of the estate to Daniel Cronin, at John Coltsman's death, depend upon the circumstance of there being no issue of the latter then living, when the codicil contained no disposition which would carry the property to such issue, if there had been such. John Coltsman taking only a life estate under the will, the Chief Baron appears to have thought that the circumstance of John Coltsman being the testator's heir-at-law, and so taking the reversion *by descent*, made no difference in this matter.

(a) 1 Atk. 432.

(b) 2 K. & J. 405.

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Thus far, on the Chief Baron's treatment of the case, it would be reasonably clear. Assuming that "heirs of the body" were, on this question, equivalent to "issue," it would stand thus:—If the will and codicil were conversant only with Flesk Castle, it would be clear enough that *the defendant* would be entitled to judgment. But if they were conversant only with Dicksgrove, it would be nearly as clear, even on the Chief Baron's hypothesis (unless John Coltsman's heirs and assigns make a difference), that *the plaintiff* would be entitled to judgment. But, in fact, both instruments are conversant with both estates; and in the codicil they are united in one single disposition. Here the difficulty arose by which the Chief Baron was embarrassed. What was to be the effect of this? Was the plaintiff to succeed as to one estate, and the defendant as to the other; that is to say, were the same words, in the same sentence, to have two opposite meanings as applied to two real estates? Or, if the estates must go together, which should prevail? Should Flesk Castle give way to Dicksgrove, or Dicksgrove to Flesk Castle? The way in which the Chief Baron solved the difficulty was this: he satisfied himself, from the reasons which will be found in his judgment [p. 191], that "he was constrained" to give to the words introducing the devise over the same effect as applied to both estates. And being satisfied of that, he next considered that what I may call the Flesk Castle construction would fulfil the testator's general intention, to be collected from both instruments, better than the Dicksgrove construction; and, in that way, he brought himself to the conclusion that John Coltsman did not take an estate tail in either denomination, but that, as to both, there was an executory devise over to Daniel Cronin upon the death of John Coltsman without leaving issue then living.

With unfeigned deference to the pre-eminently distinguished Judge whose judgment I am obliged to review, I must say that this reasoning fails at a point to which his attention does not seem to have been directed at all, and which was not, I think, mentioned in the argument in this Court either. Grant that the words "heirs of the body" are cut down by the words "at the death," to the signification of issue living at the death, and that, consequently, John Coltsman

took no estate tail, still I am unable to discern how the devise over in that event to Daniel Cronin could operate as to Dicksgrove *by way of executory devise*. It clearly *would* so operate as to Flesk Castle, because it would be in defeasance of the fee devised by the will. But, equally clearly, it would *not* so operate as to Dicksgrove, because it would not take effect as to that till the natural expiration of the life estate given by the will, and not even then except in a contingency. Therefore, as to Dicksgrove the limitation would be a contingent remainder, not an executory devise. And as the reversion in fee expectant on this life estate, and on the interposed contingent remainder, would descend on John Coltsman himself, and there were no trustees to preserve contingent remainders, the inevitable consequence would be that, by the operation of the deed of the 7th of July 1835, the life estate would be merged in the reversion, and the contingent remainder destroyed. The statutes for the protection of contingent remainders were not passed till long after these transactions, and do not revive remainders which were destroyed before their enactment. Thus, the direct result of the Chief Baron's construction, which denied an estate tail to John Coltsman, would be that he would acquire the fee in Dicksgrove by destruction of the contingent remainder, and the plaintiff would at all events be entitled to judgment for Dicksgrove. So that the general object to which the Chief Baron directed his reasoning, the one which, as he said, he felt himself constrained to effect—namely, giving to the clause in the codicil the same interpretation as to the two estates, and thus keeping the two in the same channel of limitation—would, so far from being attained by his construction, be totally frustrated. To borrow his own language, the same words *would* have, in the same sentence, two different and, in effect, opposite meanings; and the estates would be wholly severed in limitation. So strongly was it felt that this result was, of all others, the one most repugnant to the testator's thoughts, that ingenuity has been stimulated to the end of, if possible, discovering an escape from it; and, accordingly, since the argument was concluded, a point has been suggested, by means of which it was said that *the codicil* could be made to give John Coltsman an

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Exch. Cham. Flesk Castle, and, like it, brought under the authority of *Doe v.*
 COLTSMAN. *Frost*, and the cases which have followed it. To attain this *desi-*
v. *deratum* of a fee in Dicksgrove, resort has been had to the rule
 COLTSMAN. of construction laid down in *Doe v. Cundall* (a), and discussed by
 Mr. *Jarman* in his 33rd chapter, vol. 2, p. 223, 2nd ed.; but more
 especially to a suggestion of Mr. *Jarman's* as to a certain extension
 of that rule, which he there says "may be plausibly contended for;"
 and within which it has been suggested that the present case may
 be brought.

I am unable to concur in this suggestion; and as two Members
 of the Court already have made it the ground of their judgment
 in the defendant's favour as to Dicksgrove, and as Counsel had not
 the opportunity of meeting it, I shall state more fully than I should
 otherwise have thought it necessary to do so, my reasons for re-
 jecting it.

The rule discussed in the passage of *Jarman*, which I have
 referred to, is simply this, that when an indefinite devise, which
 would give only a life estate, is succeeded by a gift over in the
 event of the devisee dying under twenty-one, or under any other
 named age, the gift over is supposed to indicate an intention that,
 if the first devisee attains the specified age, he shall then retain the
 estate in fee; because, unless that was meant, the making the gift
 over depend on death at a particular age would be merely capri-
 cious. Then, in the extent to which authority has yet carried it,
 Mr. *Jarman* adds that this implication may be plausibly contended
 for, even where the contingency with which death is associated does
 not relate to the age of the devisee at all. This seems perfectly
 reasonable, if the contingency be one which may be determined in
 the negative, leaving the first taker still in life,—as, for example,
 gift over in case the first taker dies before he returns from Rome, or
 before he acquires a certain title in a certain other estate; then the
 same implication arises, that if he does return from Rome, or does
 acquire the other estate or title, *he* shall *retain* the devised estate.
 But when *Jarman* goes on to give us an example, the contingency,

(a) 9 East. 400.

“if he dies without leaving issue living at his decease,” then over, he enters on more debatable ground; because that contingency cannot be resolved either way before the last moment of the first taker’s life; and, therefore, the implication which the words suggest is, not that *he* shall *retain*, but rather that the issue shall take, which they could only do by raising an estate in tail and not in fee in their father. But, be that as it may, this at all events is certain, that, to found Mr. *Jarman’s* proposition at all, the contingency must be *expressed* in the plain, unequivocal language he has used, “if he dies *leaving no issue living at his decease.*” But if the words which are relied on for restricting the failure of issue to the death of the first taker are matter for doubt and argument, if, in short, they be the very words which we find in the codicil—viz., “if John “Coltsman die without heirs of his body, in that case, and in default of such heirs, the lands shall, *at his death,*” go over,—then the case falls under a totally different canon of construction, for Mr. *Jarman’s* opinion, on which you must go to another of his chapters, where you will find it given, not as a theory of possibly plausible contention, but a thing perfectly settled, and it is this—that such words as we have here, following an indefinite devise, are *not* allowed to restrict the failure of issue at all; and that, consequently, the first taker takes, not an estate in fee, but an estate in tail. I refer to the 41st chapter, p. 442 of the 2nd vol., 2nd ed., where he is discussing these very cases of *Doe v. Frost* and *Parker v. Birks*, and the rest of them; where he points out that in all of them the previous devise standing alone would confer a fee; and goes on to show that when that is wanting—*i. e.*, when the previous words standing alone would give only a life estate,—the whole reason of these cases ceases, the apparently restrictive words are rejected, and the first devisee takes an estate tail. And he cites *Wylde v. Lewis* (a). And what was that case? Indefinite devise to testator’s wife; and if it should happen that she shall have no son or daughter by me begotten, and for want of *such* issue, over. The difficulty was, that if she were held to take only a life estate, with a contingent remainder over in case of no son or daughter, the son or

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(a) West, *temp.* Hard.

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daughter, if there should be any, would take nothing under the will. It never occurred to Lord Hardwicke, or any one, that there was any possible mode of escaping this but the one—namely, giving the wife an estate tail. It never crossed his mind that he could give the wife a fee. The true rule is best stated in that most excellent treatise, *Prior on the word Issue*, section 104; and the passage I am about to read will be found quoted and approved by Wood, V. C., in 2 *Kay. & J.*, p. 405:—"That when there is nothing in the will to give an estate to the issue, or to give to the ancestor more than a life interest, words in the limitation over, not directly expressing, but which, in the generality of cases, would be considered as intimating an intention on the part of the testator that the failure of issue should be confined to a limited period, shall not have this effect, but that, on the contrary, the gift over shall, if possible, be construed as taking effect on an indefinite failure of issue, for the purpose of creating—according to the rule stated (179)—an estate tail in the ancestor, and thereby securing a devolution of the property to his issue."

Such, according both to *Prior* and *Jarman*, is the rule, when the words in the limitation over do not *directly express* that the failure of issue shall be confined to a limited period, though they would, in the generality of cases, be considered as so confining them; the estate must be an estate tail, if the previous words of themselves could give no more than a life estate. But to make a case at all for Mr. *Jarman's* suggested plausible contention upon the rule, at page 223, the words in the limitation over *must directly express* the restriction of the failure of issue—*i. e.*, they must "die without leaving issue living at his decease." With the utmost deference for those who have sought to apply this rule to the present case, it seems to me that they proceed upon a palpable *petitio principii*. The estate in Dicksgrove, which, under the will, would be a life estate, becomes, it is said, a fee under the codicil: why? because there is then a gift over on a failure of heirs of the body *at a limited time*. But that is the very point in dispute—namely, whether the failure spoken of is a general failure, or a failure at John Coltsman's death. Or the argument may be resolved into a vicious circle, thus:—

the life estate under the will becomes a fee under the codicil; *because* "heirs of the body" bears the restricted construction, and, therefore, *Doe v. Cundall* applies. But why does heirs of the body bear the restricted construction? *Because* the estate is a fee under the codicil, and therefore *Doe v. Frost* applies. The estate is a fee, because the construction is the restricted one; and the construction is the restricted one, because the estate is a fee. The truth is that, as to Dicksgrove, there is, upon this will and codicil taken together, but one alternative open—namely, that which lies between an estate for life and an estate in tail. As to an estate in fee, whatever pretence there may have been for it on the will (which, I believe, all the Court concur in rejecting), there is, in my opinion, none at all for it upon the codicil. If, then, John Coltsman took an estate for life in Dicksgrove, he acquired the fee by destruction of the contingent remainder; if he took an estate tail, he acquired the fee by the Fines and Recoveries Act. In either event, Dicksgrove passed under his will; and I confess it appears to me to be reasonably clear that the plaintiff is now entitled to a verdict for Dicksgrove. But then comes the question which, in my mind, constitutes the difficulty of the case. What are we to do with Fleak Castle? Are these words, "at my son's death," whenever they occur in a will, possessed of that inflexibly restrictive potency upon previous words which without them would give an estate tail; that though letting them so operate will destroy the whole plan of the will as to another estate associated in the same clause, nevertheless they must prevail even against "*heirs of the body*"? Is this a fitting case in which to make the first decision, that words at best but ambiguous can control terms of art, about the most rigid and stubborn to be found in our law?

Hitherto, it will be seen (if I have made myself intelligible) that I have been treating the case from the Exchequer point of view, in one essential particular—namely, as if "heir of the body" were synonymous with "issue;" and I have endeavoured to show that, even on that supposition, the verdict must be entered for the plaintiff as to Dicksgrove. I have now to state that I differ with the Exchequer in that particular: and this brings me to my own

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view of the true construction of the codicil. Considerable difficulty is undoubtedly occasioned by the peculiarity of the codicil having united in the same clause two estates, on which such wholly different conditions had been impressed by the will. But, in my opinion, we have only to adhere to the proper legal signification of the highly technical terms which are used in this codicil, to arrive at the construction which shall best meet and cope with the specialties and difficulties of both these testamentary instruments. The words in the clause introducing the devise over are "heirs of his body lawfully begotten, or to be begotten, and in default of such heirs:" "*heirs of the body*," not "*issue*." Except these words themselves, there is nothing in the will or codicil to give any estate to the heirs of the body. In all cases of this kind, whether the words used be "heirs of the body" or "*issue*," the stress of the argument is on the primary question—in what sense did the testator *intend* to use those words? Did they represent in his mind the whole line of descendants indefinitely, or did they represent such of them only as should be living at the time of the death of the progenitor? Once this question is answered, the rest is clear. If he meant the former, it is an estate tail; if the latter, an estate in fee (supposing the previous devise to have given the fee), with an executory devise over. But, in dealing with the question of intention, we must be careful to avoid a source of error by which even practised minds are frequently misled. The question is not one of intent, in the loose popular sense, involving conjectural or speculative inquiries as to what the testator would have said or thought if certain ulterior consequences flowing from his words had been pointed out to him, but as to which he had in fact no intention at all, because they never occurred to his mind; but, as Lord Wensleydale, in particular, has frequently pointed out (*a*), the question is, what is the meaning of the words he has used? And in answering that question there is another course of construction, also frequently dwelt on by the same learned lord, which must be kept in mind—namely, that technical terms, or words of known legal import, must have their proper legal effect attributed to them, unless there be clear ex-

(*a*) 6 H. of L. Cas. 106, 876.

pression or necessary implication to the contrary; and that such implication cannot be founded merely on the circumstance that the testator has used inconsistent terms, or given repugnant and impossible directions. As Lord Redesdale expressed it, in *Jesson v. Wright*, speaking of these very words, "heirs of the body:"—"Words having a fixed legal import ought not to be controlled without some clear expression, or necessary implication; inconsistent words only show that the testator was ignorant of the meaning of one or the other." "Technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise." It is obvious that to enable us to apply these principles of construction to the present case, the first thing to be done is to inquire what the legal import and effect are of these words "heirs of the body," and in what do they differ from the cognate word "issue:" an inquiry essential in the case, because the words relied on in the will as restrictive have as yet had that operation given to them only as applied to "issue," or similar terms, such as "children," or the like: in no decided case as yet, before the present, have they been allowed so to operate upon "heirs of the body." "Issue" and "heirs of the body" agree in this—they both import *prima facie* indefinite successions. As Rainsford, J., lays it down in *Harman v. Seaman* (a):—"The word 'issue' is *ex vi termini*, *nomen collectivum*, and takes in all issues to the utmost of the family, as far as heirs of the body would do." But the point in which they differ has always appeared to me to be this—"heirs of the body" is, *ex vi termini*, not only *nomen collectivum*, but also *nomen hereditatis*. Of its own proper force it imports, not only all descendants, but also that those shall continue taking one from other by inheritance in their quality of heirs of the body of the first taker. But "issue," of its own proper force, does *not* import inheritance. It is true that, when there is a devise to the issue of one to whom an estate for life of the same quality (*i. e.*, legal or equitable) is given by the same will, issue is then *prima facie* a word of inheritance, and equivalent to "heirs of the body." But in that case the proper sense of the word is departed

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(a) Finch. 292.

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from, to meet the necessities of construction. For it is only in that way that the obvious intention, that the estate should not go over so long as there were any issue of the first taker, could be provided for. If "issue" then were construed in its proper sense—i.e., as a word of purchase, none but those living at the father's death could take, and they would take only life estates. But the true way to exemplify the difference is, to suppose devises in which the words must rest exclusively on their own proper basis. Suppose a devise to "the heirs of the body" of one to whom no estate at all is given by the will; the effect of that is this—the words operate both as words of purchase and of limitation. The person who, at the moment, answers the description of "heir of the body" takes by purchase; but, though there are no superadded words of limitation, he takes an estate tail, which will descend not only through his own issue in tail, but also, failing those, through all other heirs of the body of the person originally named: *Mandeville's case* (a). Now, suppose a precisely similar devise to the "issue" of one to whom no estate is given: here is the word presented in its own unassisted force. Well, it is a word of purchase, and of purchase only. And the consequence is, that either the devise must be held void, by reason of the legal impossibility of making an indefinite line of successors purchasers, or it can only be saved by resorting to the means which, in similar gifts of personalty, have been often made use of to save them from avoidance—namely, seeking for something in the context to enable you to draw a line, within legal limits, at which all the takers must be ascertained, and excluding all who come after; but which, in the case of real estate, would be attended with this consequence, that the persons thus ascertained could take only life estates, for want of words of limitation. For it never has been held, and it would, in my opinion, be against principle to hold, that a limitation to issue simply, the progenitor taking no estate, would confer an estate tail in the way that *Mandeville's case* has established that a similar limitation to "heir of the body" will do.—[See this point discussed in *Prior on Issue*, book 1, c. 2.]—In this way the radical difference in the inherent signification of these two legal forms of expression

(a) Co. Lit. 26 b.

is distinctly brought out. From this there are two deductions, T. T. 1865.
 which bear very closely upon the present case. First, the use of a *Exch. Cham.*
 word which in its nature imports inheritance, strengthens enor- *COLTSMAN*
 mously the presumption that the testator was thinking of an *v.*
 indefinite line of descent; for it is of the nature of inheritance *COLTSMAN.*
 to last as long as there are heirs inheritable. Secondly, it indicates
 very clearly that the testator's notion was, that his son's descendants
 should take *under the will*, and not, as was argued, be left to be
 provided for outside the will, at the discretion of their parent, by
 means of a fee-simple devised or descended to him. And they could
 only take under the will by means of an estate tail, which the rule
 in *Skelly's case* requires should vest in their parent.

What I have been endeavouring to do is to reach the reason
 of what is generally expressed in terms more vague, when it is said
 that "heirs of the body" are less flexible words than "issue," and
 that they require a more demonstrative context to move them from
 their primary signification. It has been said that the technical
 signification belongs to the words only when they *expressly* limit
 the estate of the devisee, as where there is a devise to A and the
 heirs of his body; but that they do not possess it when it is by
implication that they limit the estate, as where they are used for
 introducing the devise over. All I can say of that distinction is,
 that I believe it to be entirely capricious and arbitrary, and un-
 supported, so far as I have heard, by authority or reason. The
 technical sense of these words is inherent in themselves, and belongs
 to them *prima facie* whenever they are used in connection with
 real estate, whether their effect on the limitation be express or
 whether it be implied. Where they are applied to mere personalty,
 the case is totally different—the element of inheritance is there
 wanting, because the subject is not inheritable.

Understanding then the legal weight and import of the words
 we have to deal with, and bearing in mind the rules of construction
 already mentioned, it only remains to consider whether this codicil
 affords a context sufficiently demonstrative (to borrow again Baron
 Alderson's well-known words) to force these highly technical and
 stubborn terms—"mysteriously inflexible," as Lord Cranworth has

T. T. 1865. called them—from the meaning which the law has stamped upon
Exch Cham. them. I adopt what was said by Channell, B., in *Jordan v.*
COLTSMAN *Adams* (a):—"In determining whether the legal import of the
v. "words 'heirs of the body' is to be cut down, *we must not surmise,*
COLTSMAN. "but must see very clearly that the alleged interpreting words do
 "cut down other words which carry with them a *recognised legal*
 "*meaning.*" I also approve of what was said on the subject by the late
 Baron Greene, in his admirable judgment in *Roddy v. Fitzgerald* (b).

The whole interpreting context available in this codicil, which is worthy of notice at all, is comprised in the words "shall, *at my son's death*, descend and be transferred," &c. It must at once be conceded that, if these words were absent, there would be a clear estate tail.

In my opinion those words are insufficient for the required purpose, for the following reasons:—First; it has never yet been held that such a clause can control the words "heirs of the body" at all. And, if the will and codicil were conversant only with Flesk Castle, I shall say no more than that, even in that case, I should require a closer argument than I have heard, and more consideration than I have given, before I would so hold; although it is clear, as I already stated, that such would be the effect of the clause if "issue" had been used instead of "heirs of the body." But, secondly, the clause cannot so operate as to Dicksgrove at all. I concur with the Chief Baron, that it could not so operate even if the word had been "issue." But I am, at all events, clear that the words being "heirs of the body," they must retain, at least as to Dicksgrove, their legal signification of all descendants taking in succession as heirs in tail. *Wylde v. Lewis*; *Jarman*, in his 41st chapter; *Prior*, in his 104th section; Vice-Chancellor Wood, in *Blinston v. Warburton*—all already mentioned as regards the word "issue," are *a multo fortiori* authorities when the words are "heirs of the body." And, if this be so as to Dicksgrove, then, seeing that Flesk Castle is bound up in the same sentence with Dicksgrove, and how utterly unreasonable it would be to suppose that the testator meant to use the words in different senses as applied to the two estates, I come to the conclusion that this is certainly not the case in which to make

(a) 9 C. B., N. S. 490.

(b) 7 Ir. Com. Law Rep. 142.

the first decision, if such a one ever *is* to be made, that "heirs of the body" can be controlled by such a clause. Recurring then to the question upon which everything turns, namely, what idea did these words "heirs of the body" represent in the mind of the testator; remembering the rule that he who uses technical terms must be presumed to use them in their legal sense, unless there be expression or necessary implication to the contrary; finding that the terms used here are words of art, about the least flexible known to the law; finding that the context relied on as restrictive is at best but ambiguous, and is one which never yet in any one case has been suffered to prevail against them—that, as to one of two estates bound up together in the same sentence, they *must* have their full sway;—looking at all this, I find my mind irresistibly urged to the conclusion that, as to the other estate also, they overbear the doubtful and ambiguous words by which they are sought to be controlled; and I have no doubt whatever that it is in their technical unlimited sense that they do truly represent the idea which the testator meant to express when he used them. For I am convinced that he did not intend that the estates should go over to Daniel Cronin so long as there was any heir of the body of John Coltsman, however remote, and that he *did* intend that these heirs of the body of John Coltsman should take under the codicil, and not under an intestacy. Both these intents would be effected, and could only be effected, by letting "heirs of the body" retain their legal sense; for the estate tail which they would create would carry the estates through the whole line of descendants if not barred, which is never to be presumed. The other words, "at my son's death," would then, as said by Lord Redesdale, in the passage I have already cited from *Jesson v. Wright*, be "inconsistent words, only showing that the testator was ignorant of the meaning of the one or the other;" and when that is so, the technical words must prevail. I may observe that this conclusion is strengthened by the grammatical structure of the sentence. These words, "at my son's death," are, in truth inserted merely to catch up again the thread of the sentence, which had been broken by a long parenthesis, as will be seen by reference to the codicil. I read them as if they had been

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Having once defined the sense in which the testator used the words, we have done with all question of intention. The law steps in, and at once fastens on the limitation the character of an estate tail in John Coltsman. This result, besides being, in my opinion, the one most conformable to the principles of construction, possesses the further merit, which the other certainly does not, namely, that of completely assimilating the limitations of the two estates. The difference effected by the will is abolished; the fee in Flesk Castle is reduced to an estate tail; the life estate in Dicksgrove is enlarged to an estate tail. In no other way is it rationally possible, upon this codicil, to attain the object which the Chief Baron thought, with so much reason, was the paramount one—namely, to give the same interpretation to the clause as applied to both estates.

It was urged in argument here, and seems to have had some weight in the Court below, that to give John Coltsman an estate tail would enable him to defeat the testator's intention, by barring the remainder. That is a species of argument which, though almost always used, is hardly ever regarded. The answer to it is, that if the limitations, as created by the will and codicil, be left undisturbed, they are sufficient to carry the estate to all the objects designated; and it will not be presumed, *a priori*, that the entail will be barred. Still less weight must be attached to an observation attributed to the Chief Baron, namely, that John Coltsman would be enabled to give the whole estate to his widow, notwithstanding the clause in the codicil as to making a life provision for her with the testator's own consent. As well might it be objected to any ordinary settlement, that the remainderman in tail might give the whole estate to one whom the testator had expressly declared should be only tenant for life. In short, the only elements which legitimately enter into the question are, the effect on each estate of the words in the codicil, "heirs of the body," and "at my son's death," as applied to the limitations previously created

by the will. All the rest—power of barring an estate tail, or of providing for a wife—clauses as to plate and furniture—as to taking the name of Coltsman—as to legacy to daughters—general scope and purview, and such like—all these are but vague plausibilities, which, in my opinion, are scarcely worthy of a place in the determination of the case.

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The limitation to Daniel Cronin being thus subjoined to an estate tail in John Coltsman, it is immaterial whether that limitation fall under the designation of a vested remainder, a contingent remainder, or any executory devise; whatever it was, it was barred by the disentailing assurances. In order, however, to complete my view of the case, I have no hesitation in saying that I think it was very clearly a vested remainder. Unless those words, "at my son's death," restrict the previous words to descendants then living—in which case there would be nothing to restrict an estate tail at all,—they have, in my opinion, no practical operation whatever. The cases in which the construction suggested during the argument, of an estate tail with a contingent limitation over has prevailed, have been cases in which words sufficient of themselves to create an estate tail were first used, and then were followed by such expressions as occur in the codicil. But here the only words available to create a contingency are also the only words available to create an estate tail; and you cannot make them do duty in both the disputed senses—that is to say, first, in the indefinite sense, in order to create an estate tail; secondly, in the restricted one, in order to create a contingent remainder, or devise executory. Plainly, there is either no estate tail, or, if there be, the remainder is a vested one.

Upon the whole, my opinion is, that John Coltsman took an estate tail in Dicksgrove, and an estate *quasi* in tail in Flesk Castle; and, consequently, that the verdict should be entered for the plaintiff, as to both estates.

O'BRIEN, J.

As the testator John Coltsman senior died in 1835, it follows that the construction of his will and codicil is not affected by

T. T. 1865. the Statute of Wills, passed in 1837, and that, under the Inheritance Act (3 & 4 W. 4, c. 106, s. 3), testator's son and heir-at-law, *Exch. Cham.*
COLTSMAN John Coltsman junior, took, as a devisee and not by descent, what-
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COLTSMAN. ever estate was given to him by the will and codicil.

The will commences by devising the lands of Flesk Castle (where testator resided, and which he held under lease for lives renewable for ever), in the following terms, viz.—“I give, devise and bequeath, to my son John Coltsman, all those my property, lands, tenements, and premises at and about Flesk Castle, together with the live stock on said lands; also my plate, library, pictures, and furniture.” With respect to the construction of that devise, I am clearly of opinion that, by force of the word “property,” John Coltsman junior would have taken under that devise not merely a life estate, but an estate in *quasi* fee in Flesk Castle.

It has been established by several decisions (with respect to wills made, as this was made, before 1838) that a devise of testator's “estate” to A B, even without any words of limitation, would give to A B not only the *corpus* of the lands devised, but also the entire of testator's interest therein.—[See *Jarman on Wills*, vol. 2, c. 33, s. 4.]—And it has been also decided, in several cases, that the word “property,” when it occurs among the very words of gift of the lands, would have a similar effect. Thus, in the case of *Doe v. Langlands (a)*, where testator, after some pecuniary legacies, bequeathed to two persons all the residue of his “property, goods, and chattels,” it was held that they took thereunder the fee in his real estate; and the general rule to be collected from Lord Ellenborough's judgment is, that a devise of testator's “property” would pass all his interest in his freehold lands, except the generality of the signification of that word was restrained by other parts of the will showing testator's intention to use it in a more confined sense. In another case, of *Doe v. Patteson (b)*, a devise of testator's “freehold property” to his sister was held to give her an estate in fee; Lord Ellenborough, referring in his judgment to an opinion expressed by Lord Mansfield, in *Hogan v. Jackson (c)*,

(a) 14 East, 376.

(b) 16 East, 221.

(c) Cowper, 299.

“that if the word ‘effects’ was synonymous with the word ‘property,’ it would carry the fee;” and Le Blanc, J., stated that “property” was a word large enough to carry testator’s interest in the estate. Again, in *Nicholls v. Butcher* (a), the testator devised all his “real and personal property” to his wife; and it was held that she took an estate in fee in testator’s copyhold lands; Sir W. Grant observing that he did not see how a man could be said to give all his property unless all his interest in it passed; and that in many cases the Judges had explained the meaning of the word “estate,” by saying that it imported absolute property. In *Patton v. Randall* (b), under a devise that all testator’s children should share equally in “all his property,” Sir Thomas Plummer held that they took an estate in fee in testator’s freehold estate. And, in a more recent case of *Footman v. Cooper* (c), a similar effect was given by Vice-Chancellor Kindersley to this word “property.”

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It is further contended, by plaintiff’s Counsel, that, as in the present case the word “property” is accompanied by words of locality, namely, by the words “at and about Flesk Castle,” the generality of its signification is restrained, and that it should be considered that the word “property,” in conjunction with the subsequent words “lands, tenements, and premises,” was used by testator in the more restricted sense of describing, by situation and locality, the particular lands which he devised.

It has, however, been decided in several cases, with respect to the word “estate” (when used among the words of gift in a will), that the fact of that word being accompanied by words of locality, or other words referable exclusively to the situation or *corpus* of the lands, will not restrain the general operation of the word “estate,” or prevent its giving to the devisee the fee of the lands. And I think it clear, upon the authorities to which I have referred, as to the word “property,” that such accompanying words can have no greater effect in restraining its operation. In the following cases (mentioned in 2 *Jarman*, c. 33, s. 4), it was decided that the word

(a) 18 Ves. jun. 193.

(b) 1 Jac. & W. 180.

(c) 2 Drewry, 7.

T. T. 1865. "estate" would carry the fee, notwithstanding such accompanying words, and without any words of limitation. In *Barry v. Edgeworth* (a), where the devise was of all the testator's "land and estate in Upper Catesby, in Northamptonshire." In *Tuffnell v. Page* (b), where the devise was of testator's "estate in Kirby Hall." In *Holdfast v. Martin* (c), where the devise was of testator's "estate at Baywick, Berks." In *Chichester v. Oxenden* (d), where the devise was of testatrix's "estate of Ashton." In *Roe v. Wight* (e), where the devise was of all the testator's "estate and lands, &c., 'known and called by the name of the 'Coal Yard,' in the parish 'of St. Giles, London.'" In *Harding v. Gardiner* (f), where the devise was of testator's "freehold estate, consisting of 30 acres 'of land, more or less, with the dwelling-house and erections 'on said farm, situate at Sudbury, Harrow, in Middlesex, and now 'in the occupation of J. G.'" And, lastly, in *Doe v. Fricker* (g), where the devise was in these terms:—"I give Horsecroft, my estate that I now live in, to my son J. P." Chief Baron Pollock, in his judgment in that case, lays it down as a general rule, to be deduced from all the authorities, that the word "estate," in a will, is, in its primary sense, the interest which the testator has in the thing devised; and that it is only in its secondary sense that the word "estate" is to be taken as meaning the thing itself. And Baron Parke states also, as a general rule, "that whenever 'the word 'estate' is used by a testator, though coupled with local 'description, it conveys not only the *corpus*, but also all the 'testator's interest in that *corpus*, unless the context shows that 'testator intended the term to have the narrower and secondary 'signification."

In my opinion, it clearly follows, from these several authorities, that if, in the will now before us, the word "estate" had been used instead of the word "property," the accompanying words of locality would not have prevented the devise from passing the

(a) 2 P. Wms. 523.

(c) 1 T. R. 411.

(e) 7 East, 259.

(b) 2 Atk. 37.

(d) 4 Taunt. 176.

(f) 1 Br. & B. 72.

(g) 6 Exch. 570.

entire of testator's interest in Flesk Castle. It will be seen that in some of these cases there were stronger grounds for restricting the signification of the word "estate" than exist in the present will, with respect to the word "property." And, having regard to the other decisions I have cited as to the effect of the word "property," and particularly as to Sir William Grant's observation in *Nicholls v. Butcher* (a), that the meaning of the word "estate" was explained in many cases by saying that it imported "absolute property," I think it equally clear that, in the will now before us, the effect of the word "property," in passing all the the testator's interest in the lands devised, is not restrained by the subsequent words of locality.

It has, however, been further contended that in the present case the word "*property*" was used by the testator as denoting his personal goods and chattels at or about Flesk Castle, and not as referring to the lands. But it is to be observed that the word "*property*" is used in connection with, and immediately preceding, the words "lands, tenements, and premises at and about Flesk Castle;" and that next after those words there follow in the same paragraph the words "together with the live stock on said lands; also my plate, library, pictures, and furniture." This would show that testator did not use the word "property" as denoting merely his personal goods and chattels, several (if not all) of which he specified particularly at the end of that paragraph. Besides, it has been decided in several cases that the word "property," in a will, would include real estate, though used in connection with words denoting only personal chattels, and not with such words as "lands," &c. In one of these cases, *Doe v. Langlands* (b)—to which I have already referred—the devise was of "the residue of testatrix's property, goods, and chattels." And Lord Ellenborough held that it passed a fee-simple in the real estate, and that the generality of the word "property" was not restrained by the fact of its being immediately followed by words such as "goods and chattels," denoting what was strictly personal estate.

On these several grounds, I am clearly of opinion, as already

(a) 18 Ves. 190.

(b) 14 East. 472.

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 COLTSMAN. stated, that John Coltsman junior would have taken under the will an estate in *quasi* fee in Flesk Castle. As a different opinion, however, is entertained by other Members of the Court, I have referred to the authorities on the subject more fully than I should otherwise have done.

With respect to the lands of Dicksgrove, held by testator in fee-simple, the case is different. The devise of these lands immediately follows that of Flesk Castle, and is as follows.—[Reads it.]—That is what is called an indefinite devise, without using either any words of limitation, or the word “estate” or “property,” or any other synonymous term denoting testator’s interest in the lands. It follows, therefore, according to the settled rule in such cases, with respect to wills made before 1838, that the effect of such devise standing alone would have been to give John Coltsman junior only an estate for his life in Dicksgrove. And I entirely concur in the reasons stated by the Chief Baron in delivering the judgment of the Court of Exchequer, that neither the use of the word “estates,” in subsequent parts of the will, nor the charge on testator’s “said estates,” of the annuity to his wife for her life, or of the sum of a thousand pounds to be paid to her within a year after his death, had the effect of converting that indefinite devise of Dicksgrove into a devise in fee.

Assuming, then, that John Coltsman junior would have taken under the will the entire of testator’s interest in Flesk Castle, and only an estate for his life in Dicksgrove, the next and more difficult question is, how these devises in the will are affected and altered by the codicil, dated a few months afterwards, and which testator directed should be taken as part of his will.

The clause in the codicil, to which the argument has been principally applied, is that which follows the bequest of £100 a-year further annuity to his wife, and of a legacy to his brother-in-law; and is in the following terms, viz.—“And if it should happen “that my son John Coltsman die without heirs of his body lawfully “begotten, or to be begotten, in that case, and in default of such “heirs, I do hereby devise and direct that my lands, castles, tenements, and premises at and about Flesk Castle, and mentioned in

“my said codicil, together with the plate, furniture, and library in
 “said will specified. Also my lands, farms, tenements and pre-
 “mises situate, lying and being at Dicksgrove, near Castleisland;
 “all subject to and charged with the payment of the aforesaid
 “annuity to my dear wife of £800 a-year; and also with the pay-
 “ment of any reasonable provision made with my consent by my
 “son for his wife, to be paid and payable to her during her natural
 “life, shall, *at my son's death*, descend and be transferred to my
 “grandson Daniel Cronin, his heirs, executors and assigns for ever:
 “the heir for the time being to add the name ‘Coltsman’ to the
 “name ‘Cronin.’” Testator’s grandson, named in that clause, is
 the present defendant, who has taken the name “Coltsman.”

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With respect to this clause, plaintiff’s Counsel contend that the introductory words used in the first part of it, as describing the contingency upon which the testator’s several lands were to go over to defendant, are words which import a general failure of the heirs of the body of John Coltsman junior, at whatever period it should happen. And that, therefore, according to the settled rule in such cases, the effect of that clause was to give John Coltsman an estate in *quasi* fee in Flesk Castle, and an estate tail in Dicksgrove, whether it be held that he took under the will in both or either of those lands an estate for his life only, or for the entire of testator’s interest therein respectively. Defendant’s Counsel, however, contend, in the first instance, that those introductory words were not used by testator, and should not be construed as referring to a general failure of the heirs of the body of John Coltsman junior at any indefinite time, but were used by him, and should be construed (both as regards Flesk Castle and Dicksgrove) in the restricted sense of referring to a failure of such heirs of the body at the death of John Coltsman junior. And that the contingency upon which the lands were, according to that clause, to go over to defendant was, that of John Coltsman junior dying without leaving any heirs of his body living at his death. In support of this construction, defendant’s Counsel rely upon subsequent provisions in the codicil, and particularly upon the words in the latter part of that clause, “shall, at
 “my son’s death, descend and be transferred to my grandson Daniel

T. T. 1865. "Cronin, his heirs, executors, and assigns for ever." And they contend that those latter words clearly show that the death of testator's son was the period at which the testator intended that the failure of the heirs of the body of that son should take place, in order to entitle Daniel Cronin to the lands.

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In deciding which of these two constructions of this clause is correct, and the consequent rights of the parties to the several lands in dispute, it will be seen that if (as I have already stated my opinion to be) John Coltsman junior took, under the will, an estate in *quasi* fee in Flesk Castle, but only an estate for his life in Dicks-grove, then that the case as regards Dicks-grove involves considerations and raises questions which do not exist in respect of Flesk Castle. I shall first consider the construction of the codicil and the rights of the parties as to these latter lands; and, in doing so, it may be more convenient to refer to them as if they had been held by testator *in fee*, it being clear that the effect of the will and codicil as to them would be the same, whether he held them in fee or under lease for lives renewable for ever.

Several cases have been relied on by defendant's Counsel, in which a devise of freehold lands to a party, in terms that would have given him the fee, was followed, either immediately or in a subsequent part of the will, by a devise over to another in the event of a failure of *issue* of the first taker, and in which it was held that the terms used by the testator in describing the failure of *issue* upon which the devise over was to take effect, did not import a general failure of issue *at any time*, but were used by testator in a restricted sense, as importing a failure of issue at the death of the first taker; and that, accordingly, the effect of such devise over was not to cut down the estate of the first devisee to an estate tail, but to make his estate in fee-simple determinable on the contingency of his dying without issue living at his death, with an executory devise to the second devisee on the happening of such contingency. It is, however, contended by plaintiff's Counsel, that such cases are not applicable to that now before us, on the ground that in all of them the devise over was limited to take effect upon failure of the "issue" or "children" of the first taker, and not, as here, upon failure of

"the heirs of his body." Plaintiff's Counsel contend that the words "heirs of the body" are of a much more technical and less flexible character than the words "issue" or "children;" and that no case has been decided in which (as here) there was a devise over in the event of the first devisee "dying without heirs of his body, and in default of such heirs," and in which the restricted construction has been put upon those words by holding them to import a failure of heirs of the body at the death of such first devisee. With respect to this objection, it appears to me, as regards the word "issue," that the reasoning of plaintiff's Counsel, grounded on the distinction between that word and the words "heirs of the body," does not apply to a case like the present, where the words "heirs of the body" are used—not in the words of gift to the first devisee—not as words of limitation—but as words denoting the class of persons upon the failure or extinction of whom the devise over is to take effect. It is true that, in the case of a devise to A B and his issue, or to A B for life, with remainder to his issue (which devise would, if uncontrolled by other parts of the will, give A B an estate tail), the construction of the word "issue," as *nomen collectivum*, including the whole class of descendants, might be restricted, and converted from a word of limitation to a word of purchase (so as to give a different estate to A B), by provisions or expressions in the will, which would not have such effect if the devise had been to A B and the "heirs of his body," or to A B for life, with remainder to the "heirs of his body." Even in such a case, the recent decision in *Roddy v. Fitzgerald* (a), and the judgments of Lord Cranworth [pp. 871-2] and Lord Wensleydale [pp. 881-2] show how far the same operation and effect would be given to the word "issue" when so used, as would be given to the words "heirs of the body." But I think that when (as in the case now before us) the words "heirs of the body" are used to denote the class of persons upon whose failure or extinction the devise over is to take effect, that they are to be regarded as synonymous with the word "issue;" and that the will should receive the same construction as if that word had been used instead of the words "heirs of the body." The failure of the

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(a) 6 H. of L. Cas. 823.

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"heirs of the body" of a party, and the failure of his "issue," denote the failure of the same class of persons. If there be a failure of the one, there is a failure of the other. And whether a testator uses words importing the failure or default of the "heirs of the body" of A B, or importing the failure or default of the "issue" of A B, he designates precisely the same event—namely, the failure of all the descendants of A B. And when, as in the present case, the question is, whether the terms in which the testator has referred to that event deal with it as an event to happen at a particular time (namely, the death of the first devisee), or at any time however remote, I do not see why the result should not be the same, whether he designated that event as a failure of the "heirs of the body" of the first devisee, or as a failure of his "issue." On reference to some of the cases, in which it was decided that the words "dying without issue," or other words importing a failure of the "issue" of the first devisee, should, by reason of other expressions or provisions in the will, bear the restricted construction of a failure of "issue" happening at the death of such devisee, it will, I think, appear that the reasons on which such decisions were grounded would have equally applied if the words "heirs of the body" had been used instead of the word "issue." Although, therefore, in the case now before us, the words "heirs of the body" are used, I think that those decisions are authorities for the construction which defendant's Counsel contend should be given to the clause in question.

Plaintiff's Counsel have correctly stated, as a general rule affecting all wills made before 1838, that if freehold lands be devised to A B, either in terms which give him an estate in fee or indefinitely, so as to give him only an estate for life, and if there be an ulterior devise over in the event of A B "dying without issue," or of "default or failure of his issue," then that such a devise over should be construed as a devise to take effect on a general failure of the issue of A B; and that the result of such ulterior devise would be to convert into an estate tail the estate in fee or the life estate (as the case may be) which A B would have taken under the previous devise. The reason (as stated in *Jarman on Wills*, c. 17, s. 6)

appears to be that the testator, by postponing the ulterior devise until the general failure of the issue of A B (at whatever time that failure should happen), has afforded an irresistible inference that he intended that the estate to be taken by A B, under the prior devise, "should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, if construed as an executory devise to take effect on a general failure of issue, would, of course be void for remoteness." The reason for this rule is stated in somewhat different terms by Counsel in the argument in the case of *Houston v. Hughes* (a)—namely, that as the gift over was not to take effect till the failure of A B's issue, the testator must have intended the estate to go in such a line of devolution as would include all the issue of A B; and that, in order to promote that general intention not expressly declared in the will, but inferred from the mere terms of the limitation over, an estate tail in A B was raised by implication. The result of such a devise therefore is, that, in order to give effect to the ulterior devise, and carry out testator's intention, the estate in fee, or life estate, which A B would have taken under the prior devise standing alone, is cut down or enlarged (as the case may be) into an estate tail, by implication. It is now also settled that a similar result would follow if the prior devise to A B had been expressly for his life, although it had been at one time held that in such a case the enlargement by implication would be contrary to testator's intention, as manifested by his express limitation of an estate for life. But if (as in the case now before us, with respect to Flesk Castle) the estate given to the first devisee by the prior devise be an estate in fee-simple, and if it should appear on the entire of the will or codicil that the failure of issue contemplated by the testator as the event on which the ulterior devise should take effect, was not an indefinite failure of issue, at whatever time it might happen, but a failure to take place at the death of the first devisee, then, as the ulterior devise would not, in such case, be void for remoteness (being a devise to take effect, if at all, on the death of the first devisee), there would be no occasion to apply the general rule I

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(a) 5 Russ. Ch. Beq. 124.

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COLTSMAN. have mentioned, or to alter into an estate tail the estate given to such first devisee by the prior devise; because the ulterior devise would (without any alteration of such prior estate) be valid and take effect as an executory devise. If, therefore, in the present case, the introductory words in the codicil referring to John Coltsman junior dying "without heirs of his body," and to the "default of such heirs," should be considered as having been used by testator in the restricted sense already mentioned, and as referring to the event of a failure of such "heirs of the body" taking place at the death of John Coltsman junior, it follows (as contended for by defendant's Counsel) that under the joint operation of the will and codicil he took in Flesk Castle an estate in *quasi* fee, determinable in the event of his dying without leaving any heirs of his body living at his death, and with an executory devise over to defendant and his heirs on the happening of such event.

I shall now refer to some of the cases cited in the argument, which, in my opinion (having regard to subsequent expressions and provisions in the codicil), fully warrant our putting such restricted construction on those introductory words. In *Doe v. Frost* (a), the testator, after devising certain freehold lands to his son William and his heirs, and an annuity thereout to testator's wife for her life, declared that if William "should have no children, child, or issue," the said estate was, "on the decease of William," to become the property of the heir-at-law, subject to such legacies as William might leave by will to any of the younger branches of the family. William died some years after testator's death, without leaving any issue; and it was held by the Court that the failure of William's issue contemplated by the testator was not an indefinite failure of issue, but was a failure to take place at William's death; and that, accordingly, William took under the will an estate in fee, with an executory devise over, in the event of his dying without issue living at his death, to the person who should, on the happening of that event, be testator's heir-at-law. The decision in that case was in no way influenced by the use, along with the word "issue," of the words "child or children;" which latter words were in the

(a) 3 B. & Ald. 546.

argument considered—upon the authority of *Doe v. Webber* (a)—as synonymous with the word “issue;” but the case was decided upon the ground, as stated by Abbott, C. J., in his judgment [page 554], that the testator’s plain intention appeared to have been “that, “at the period of the decease of his son William, it should be “ascertained whether the estates devised to him by the will should “then vest in fee in him absolutely, or pass over to some other “person, subject to such legacies as he might by will devise to “any of the younger branches of the family.” Bayley, J., and Holroyd, J., in their judgments, relied on the words “on the decease of William” as clearly showing testator’s intention that the event upon which testator’s estates were to go over to his heir was not an indefinite or general failure of the issue of William, but only a failure of issue. It is true that the latter part of the clause, which provided that the estates should be subject to legacies to be left by William to the younger branches of the family, was also relied on by the Court as confirmatory of their decision; but it is equally clear, from the judgment of the several Members of the Court, that, even if such provision had not been in the will, their decision would have been the same, as to the effect of the words “on the decease of William.” Again, in *Ex parte Davies* (b), before Lord Cranworth, certain freehold estates were devised to testator’s son Matthew, and his heirs, with a proviso that, in case Matthew “should die without leaving any lawful issue of his body,” then said freehold estates should, “at Matthew’s death,” be divided into two equal parts, which testator devised to his (testator’s) son Charles and his daughter Frances, and their heirs respectively; “Matthew having it in his power to give sufficient to the children of his late sister Anne,” out of certain personal estate therein mentioned. It was held, in that case, in accordance with previous decisions, that the words “dying without leaving any lawful issue” would, if uncontrolled by subsequent parts of the will, have given Matthew an estate tail, as if the words had been “dying without issue”—(such being the settled rule with respect to a devise of freehold estate). But Lord Cranworth was also of opinion that

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(a) 1 B. & Ald. 713.

(b) 2 Sim., N. S. 114.

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 COLTSMAN given in *Doe v. Frost* to the direction that the lands should go
 v. over "on the decease of William;" and he accordingly held that
 COLTSMAN. the failure of Matthew's issue, contemplated by the testator, was
 not a general failure of issue, but a failure to take place at
 Matthew's death, and that therefore Matthew took an estate in
 fee, with an executory devise over to Charles and Frances, in the
 event of Matthew dying without issue living at his death. In
 his judgment he expressly stated that he did not decide the case
 upon the ground of the clause referring to Matthew's power of
 providing for the children of his sister Anne, and that he was
 prepared to deliver his judgment before that clause was brought
 to his attention; and he refers to the judgments of Bayley, J.,
 and Holroyd, J., in *Doe v. Frost*, as showing that, in their opinion,
 the will in that case would have given William an estate in fee,
 with an executory devise over, independently of the clause referring
 to the legacies to be left by William. Lord Cranworth in his judg-
 ment refers to the cases of *Walter v. Drew* (a) and *Broadhurst v.*
Morris (b), which were also relied on by plaintiff's Counsel in
 the argument before us. He states the reasons why he considered
 that those cases did not govern that before him; and which reason
 would also show they do not govern the present case.

I shall next refer to the case of *Parker v. Birks* (c), before Vice-
 Chancellor Wood, in which also the restricted construction was put
 upon words importing a failure of issue of the first devisee, although
 there was not any provision in the will to warrant that construction,
 except the direction that the estates should go over on the death of
 the first devisee. In that case the testator, by will, made in 1816,
 devised one-third of his real estates to William Shaw and his heirs,
 but, in case said William should die without child or children "of
 his body lawfully begotten," then the testator devised said one-third
 to the children of his niece Hannah Grey, and their heirs, "on the
 decease of said William Shaw." The plaintiffs in that cause, who

(a) Com. Rep. 373.

(b) 2 B. & Ad. 1.

(c) 1 Kay. & J. 156.

were the children of Hannah, contended that, under said devise, William took in said one-third an estate in fee, with an executory devise over to the children of Hannah, in the event (which had happened) of William dying without issue living at his death. The defendants, on the other hand, contended that William took therein an estate tail, with remainder to the children of Hannah; but the Vice-Chancellor decided in favour of the former construction. In his judgment, after referring to *Doe v. Webber* (a), and to *Baggott v. Beatty* (b), he adopted the argument of the defendant's Counsel, that the words "child or children of his body lawfully begotten," which, in the will before him, were used in the gift over, meant "issue;" and he accordingly dealt with the case as if the devise over had been in the event of William "dying without issue of his body." With respect to *Doe v. Frost* and *Ex parte Davies*, Vice-Chancellor Wood observed upon the fact that the wills in those cases contained the further provisions, already mentioned, as to legacies or gifts to be given by the first devisee; but he referred particularly to the judgments of Bayley, J., and Holroyd, J., in the former case, and of Lord Cranworth in the latter, as showing clearly that they rested their decisions not upon those provisions, but upon the directions that the estates should go over "on" or "at" the death of the first devisee; and, in accordance with those decisions, he gave a similar effect to the use in the will before him of the words "on the decease of William," as denoting the period when said one-third was to go over to the children of Hannah and their heirs; and he accordingly held the true construction of the will to be, that William took in the one-third an estate in fee-simple, with an executory devise over, in the event of a failure of his issue at his death, to the children of Hannah and their heirs. In page 167 of his judgment, he states:—"It would be a singular construction if I were to hold that William Shaw, taking this estate in fee-simple, on which I cannot engraft a remainder, but every limitation over upon which must be an executory devise, I must first cut down his estate in fee to an estate tail, in order to enable me to decide that the gift over

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(a) 1 B. & Ald. 713.
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(b) 5 Bingh. 243.
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T. T. 1865. "is simply a remainder upon such estate tail, created by the an-
Exch. Cham "terior devise." It does not appear that the decisions in these
 COLTSMAN three cases, *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Birks*,
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 COLTSMAN. have been overruled or questioned. And I think that, in accordance with them, we should hold in the present case that, as regards the lands of Flesk Castle, the words "at my son's death," used in the codicil as denoting the particular period when (if at all) the testator's lands should "descend and be transferred" to Daniel Cronin and his heirs, clearly manifest testator's intention that the failure of the heirs of John Coltsman's body, mentioned in the previous part of the clause, was a failure of issue to occur at that same period; and that the death of said John Coltsman was the period at which testator intended it should be definitively ascertained, by the happening or non-happening of such contingency at that period, whether said lands should go over to defendant and his heirs, or should vest absolutely in said John Coltsman junior and his heirs.

A distinction has indeed been suggested between those three cases and the present, on the ground that in those cases the first devisee took an estate in fee-simple, by express words of limitation, to him and his heirs; whereas, in the present case, he only took the fee-simple under the first devise in the will, by force of the word "property." In my opinion, however, this distinction, as regards the question before us, is immaterial; and the principles and reasonings on which those decisions were grounded are equally applicable, whether the estate in fee-simple in the first taker was given by express limitation to him and his heirs, or by any other words or provisions. In the case of *Blinston v. Warburton* (a), also before Vice-Chancellor Wood, the devise to the first taker was indefinite, without words of limitation; but it was held that she took an estate in fee-simple, by reason of a pecuniary charge imposed upon her, as the consideration for the devise; there was then a devise over in case of Sarah dying "without lawful issue;" which words, it was contended for the plaintiff, should, by reason of some subsequent provisions in the will, be construed as importing, not a general failure of issue, but a failure to take place at Sarah's death. The

(a) 2 Kay. & J. 400.

Vice-Chancellor adopted that construction, and did not consider that the question was affected by the circumstance that the estate in fee-simple which Sarah took under the first devise was merely a constructive fee.

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Plaintiff's Counsel have relied on Lord St. Leonards' decision in *Jones v. Ryan (a)*, which was not cited before Lord Cranworth or Vice-Chancellor Wood. In that case, however, the only ground apparent on the will for giving the restricted construction to the words importing the failure of issue of the first devisee (testator's son) was, that the words "after his death" were used as denoting the period when the devise over was to take effect. And there is a material difference between the word "after" and the word "at," which occurs in the present codicil. Lord St. Leonards, in his judgment, also observed upon the fact that, in the limitations over to several subsequent devisees, the failure of their respective issue was referred to, in each case, in terms which clearly denoted a general failure of their issue respectively, so as to give them successive estates tail; and he expressed his opinion that it would make the will consistent to put a similar construction on the word importing the failure of issue of the first devisee. There was nothing in the will, except the words "after his death," that indicated testator's intention to confine the failure of his son's issue to a failure at the son's death; while, on the other hand, the terms of the limitations over would show a contrary intention. It appears to me, therefore, that the decision in *Jones v. Ryan* does not govern the present case. Some of the other cases on which plaintiff's Counsel have relied are referred to by the Chief Baron, in his judgment in the Court below, as distinguishable from that now before us.

It has been further contended, for plaintiff, that, even if the failure of the heirs of the body of John Coltsman junior, referred to in the codicil, was a failure at his death, still that the construction of the will and codicil should be to give him an estate tail in Flesk Castle, with a contingent remainder over to Daniel Cronin in fee-simple, in the event of such failure of the heirs of John Coltsman's body at his death; in which case such contingent remainder would

(a) 9 Ir. Law Rep. 249.

T. T. 1865. have been barred, and defendant's title defeated by the deeds of the
Esch. Cham. 7th and 8th of July 1835, executed as to Flesk Castle. In my
 COLTSMAN opinion, however, such a construction cannot be sustained. In the
 v. COLTSMAN. case of a devise to A B in fee-simple, with an ulterior devise over in
 the event of a general indefinite failure of his issue, it would be
 necessary to cut down his estate in fee-simple under the prior devise
 to an estate tail, in order to give effect to the ulterior devise, and
 prevent its being void for remoteness; but such necessity could not
 exist if the failure of issue, on which the ulterior devise was to take
 effect, was a failure at the death of A B; and there is no authority
 for holding that, in such a case, the previous estate in fee-simple
 should be cut down into an estate tail, by implication, in order that,
 instead of construing the devise over to be an executory devise
 (which would not be void for remoteness), we should construe it as
 a contingent remainder, which was to take effect, not upon the deter-
 mination of such estate tail at any time, but only in the event of its
 determining at the death of A B without leaving any issue then
 living. The observations of the Vice-Chancellor in *Parker v.*
Birks (a), and the decisions in other cases already cited, and also
 that in *Bells v. Brown* (b), are opposed to such a construction.

There are other provisions in the codicil, on which defendant's
 Counsel have relied as also showing that the failure of the heirs
 of the body referred to by testator was a failure at the death of
 his son; but I think the grounds I have already cited are suffi-
 cient to sustain that construction; and that, accordingly, the estate
 in fee-simple which John Coltsman junior took in Flesk Castle
 under the will was altered by the codicil, not into an estate tail,
 but into an estate in fee-simple, determinable in the event of his
 dying without leaving any heirs of his body living at his death,
 and with an executory devise over, on the happening of such event,
 to defendant and his heirs. It would follow from this, that, as
 the executory devise was not affected by the deeds of 1835, and
 as such event subsequently happened, the defendant thereupon
 became entitled to those lands.

With respect to the lands of Dicksgrove, the case involves some

(a) 1 Kay & J. 166, 167.

(b) Cro. Jac. 591.

further considerations. John Coltsman junior took only a life estate in those lands under the will; and this construction has been urged by plaintiff's Counsel as a reason why, with respect to those lands, at all events, the words in the codicil which import a failure of the heirs of his body should not receive the restricted construction of a failure at his death. It is true (as plaintiff's Counsel contend) that, in determining whether words in a will, importing a failure of issue of the first devisee, should receive such a restricted construction, or should be construed as referring to an indefinite failure of issue, a distinction has been taken between the case where the estate given to the first devisee by the preceding devise is an estate in fee-simple, and the case where such preceding estate is only an estate for his life. In the latter case, if he left issue living at his death, the result of giving the restricted construction would be, that the subsequent devise would altogether fail; and yet, under the limitations of the will, no estate would devolve upon the issue of the prior devisee, or could be transmitted by him to them. This objection to the restricted construction was acted on by Lord Hardwicke, in *Wylde v. Lewis* (a), and is referred to in *Jarman on Wills*, c. 41 (towards end of section 2).—See also *Thomas v. Butt* (b).—The present case, however, is distinguishable from any in which that particular objection has prevailed, inasmuch as, even supposing that the estate which, under the will and codicil, John Coltsman junior took in Dicksgrove, immediately preceding the subsequent devise to defendant, was only an estate for life, then the ultimate reversion in fee-simple expectant upon the failure of that subsequent devise would have descended upon him as heir-at-law. It would follow, therefore, that, in the event of his leaving issue living at his death, such issue might be provided for out of that reversion, in the same manner as if an estate in fee-simple had been, in the first instance, limited to him by the will. In *Wylde v. Lewis* the first devisee was not testator's heir-at-law. And it is also to be observed that in that case the provisions of the will, which were relied on in support of the restricted construction, were subsequent to the words which Lord Hardwicke held sufficient to create an

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(a) 1 Atk. 432.

(b) 11 Exch. 235, and 1 H. & N. 109.

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estate tail in the first devisee; and he refused to give effect to such provisions, on the ground that, "if the preceding words were proper "to create an estate tail, their legal operation could not be controlled by those provisions." No case has been cited in which this objection to the restricted construction was held to prevail where (as in the present case) the first devisee was testator's heir-at-law, and where also the words immediately preceding the limitation to the subsequent devisee referred expressly to the death of the first devisee as the period when the lands were to go over to the subsequent devisee. Notwithstanding this objection, it appears to me that, in the present case, the words in the codicil importing the failure of the heirs of the body of John Coltsman junior should receive, with respect to the devises of Dicksgrove, the same construction as I have stated with respect to Fleak Castle—namely, that of importing a failure of such heirs at his death. The testator deals with both denominations in one and the same clause; and not merely the introductory words of that clause, which refer to the failure of the heirs of his son's body as the event upon which the devised lands should go over to defendant and his heirs, but also the subsequent words "at my son's death," which are used by testator in mentioning the period when those lands should "descend and be transferred" to defendant and his heirs, are applied by testator in common to both denominations. In my opinion, the terms of this clause indicate an intention on testator's part, with respect as well to Dicksgrove as to Fleak Castle, that the death of his son was to be the period, when that event should take place, in order to entitle defendant to those lands; and when it was to be definitely ascertained, by the happening or non-happening of such event at that time, whether the devise over to defendant was to take effect or to fail. With respect, however, to the circumstance of both denominations being included in the same devise, plaintiff's Counsel have relied on the case of *Forth v. Chapman* (a), where, although freehold and personal estate were included in the same gift, it was nevertheless held that the words importing the failure of issue of the first devisee, upon which both estates were directed

(a) 1 P. Wms. 687.

to go over, should be construed with respect to the freehold estate as referring to an indefinite failure of his issue, but, with respect to the personal estate as referring to a failure at his death. But in that case the qualities of the two estates, and the lines of devolution in which they would go were different. The words were: "In case William or Walter" (the first devisees) "should depart this life, and leave no issue of their respective bodies." It is clear, upon authority, that, in consequence of the phrase "leave no issue," those words should, with respect to the freehold estate, be construed as importing an indefinite failure of issue, so as to give the first devisee an estate tail, in the devolution of which all such issue would be included; while, on the other hand, with respect to the personal estate, the issue, as such, would take nothing in it under the will, whatever construction was put upon those words; and by construing them to import an indefinite failure of issue, with respect to the personal estate, the bequest over of that estate would be altogether void. A different construction was, therefore, put upon those words with respect to the two estates, in order to support the intention of the testator, and make both devises good.— [See Lord Hardwicke's observations on *Forth v. Chapman* in *Sheffield v. Orrery* (a).]—But (as was observed by the Chief Baron, in his judgment in the Court below) we should "go a great deal further than was done in *Forth v. Chapman*," if, in this case, where both the denominations devised are freehold estates, capable of going in the same line of devolution, and where the words "at my son's death" (which were used by testator in mentioning the period when the devised lands should descend and be transferred to defendant) were applied by testator in common to both denominations, we should nevertheless hold testator's intention to have been, that the two denominations should go in different lines of devolution, and that those words should have a different effect as to one denomination from what they had as to the other. In *Doe v. Webber* (b), one of the grounds stated by Lord Ellenborough in his judgment [p. 722] for giving to words importing the failure of issue of Mary Hiles the restricted construction of a failure at

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(a) 3 Atk. 288.

(b) 1 B. & Ald. 713.

T. T. 1865. her death, was, that otherwise she would have taken two different
Exch. Cham. estates in freehold lands which had been given to her by the same
COLTSMAN devise in a previous part of the will ; and the same words of devise
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and an estate in fee-simple in others. There would be a somewhat
similar result in the present case, if we held that the failure of the
heirs of his son's body, referred to by testator, was, as regarded
Flesk Castle, a failure at the death of his son, but as regarded
Dicksgrove, an indefinite failure at any time ; and that, although
the words "at my son's death" had, as to Flesk Castle, the effect of
fixing the death of the son as the period when such failure was
to take place, they had no such effect as to Dicksgrove, though
they were used as applying in common to both denominations. It
would follow, from that construction, that in case the testator's
son left any issue living at his death, then the devise in defendant's
favour would altogether fail as to Flesk Castle, though it would
afterwards take effect in possession as to the lands of Dicksgrove,
in the event of there being a subsequent failure of such issue, and
of the estate tail which testator's son took in those lands not having
been barred.

Assuming, however, that, with respect also to Dicksgrove, the
failure of the heirs of the body referred to by testator was a failure
at the death of his son, still, in order to sustain defendant's title
to those lands, it would be necessary also to hold that the life
estate which John Coltsman junior took therein under the will
was enlarged by the codicil into an estate in fee-simple. If the
will and codicil should be construed as giving testator's son only
a life estate in Dicksgrove, with a limitation over to defendant
and his heirs in the event of there being at the son's death a failure
of the heirs of his body (which limitation over being expectant
upon a life estate would, according to the established rule, take
effect as a contingent remainder, and not as an executory devise),
then the ultimate reversion in fee-simple, being undisposed of by
the will and codicil, would have descended to testator's son as
heir-at-law ; and the conveyance of Dicksgrove by him in the
disentailing deed of 7th of July 1835 would have caused an im-

mediate merger of his life estate in that reversion, and, consequently, an immediate destruction of the defendant's contingent remainder. Such merger would not have been caused by the descent at testator's death of that reversion upon his son, as long as the estates limited by the will and codicil remained unaltered.—

[See *notes to Purefoy v. Rogers (a)*.]—But I think it clear that, upon the construction of the will and codicil I am now supposing, such a merger would have been caused by the disentailing deed of 1835, under which the life estate and remainder would have become consolidated; and that thereby defendant's contingent remainder would have been destroyed, as that deed was executed before the contingency happened, and as the remainder would not be affected by the provisions of the 8 & 9 Vic., c. 106, s. 8, which preserved only those contingent remainders that were existing after the 31st of December 1844. The result I have stated of such construction of the will and codicil is in accordance with what Mr. Butler states in his *note* to the 5th chapter of *Fearne on Contingent Remainders* (section 6, *note F*), and also with the decision of Sir John Romilly in *Pickersgill v. Gray (b)*. In that case the testator, being entitled to some lands in fee-simple, and to others under leases for lives, devised same to his son Thomas for life, with several contingent remainders over in favour of the children of Thomas (who never had any), and of other persons, with an ultimate remainder to testator's heirs. Thomas, who was testator's heir-at-law, took, therefore, under the will a life estate, and also such ultimate remainder; and afterwards, in 1843, executed a conveyance of all said lands to a trustee and his heirs, upon certain uses. Sir John Romilly considered it clear, that with respect to the fee-simple lands such conveyance destroyed the contingent remainders; but he decided, with respect to the lands held for lives that the conveyance had not that effect, inasmuch as merger could only take place where the second estate was larger than the first, and as, from the peculiar nature of estates *pur autre vie*, the ultimate remainder which Thomas took therein (being in

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(a) 2 Saund. Rep. p. 282, n. (16), and p. 282 b, n. (a).

(b) 31 Law Jour., Ch. 394.

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contemplation of law nothing more than a possibility of interest) was a lesser estate than the estate for life which was devised to him in the first instance. I may observe that, according to this latter decision, there would not, upon any construction of the will, have been any merger as to Flesk Castle, even supposing John Coltsman junior took therein only a life estate under the will and codicil. It does not appear from the report in the present case in the Court below (a), that this point, as to merger, was relied on in the argument there, and the question was not raised in the argument before us. Defendant's Counsel have, however, contended (with respect to other questions in the case) that, even if John Coltsman junior took only a life estate in Dicks Grove, under the indefinite devise thereof in the will, yet that the provisions of the codicil had the effect of enlarging that estate into an estate in fee-simple, by implication, inasmuch (amongst other reasons) as, upon the entire will and codicil, testator's manifest intention appears to have been not merely that, in the event of John Coltsman junior dying *without having* any heirs of his body living at his death, those lands should become the absolute property of defendant in fee-simple, but also his intention that, in the alternative event of John Coltsman junior *leaving* any such heirs living at his death, those lands should become his absolute property for a like estate in fee-simple. Defendant's Counsel relied, in support of this construction, on the case of *In re English* (b), and on some other cases referred to on this subject in 2 *Jarman on Wills*, c. 33, s. 3.

I entertained at first some doubts upon this question, but I am of opinion, upon further consideration, that such construction of the codicil is correct. The result of this would be that, in Dicks Grove as well as Flesk Castle, John Coltsman junior would take under the will and codicil an estate in fee-simple, with an executory devise over to defendant in fee-simple, in the event of there being a failure of the heirs of the body of John Coltsman junior at his demise; and that, accordingly, as such executory devise would not be affected by the disentailing deed of 1835 (either by reason of merger or otherwise), the defendant would be entitled also to Dicks Grove.

(a) 15 Ir. Com. Law Rep. 171.

(b) 2 Ir. Com. Law Rep. 284.

It has been decided in several cases, that where, in a will regulated by the old law, an indefinite devise of freehold lands to A B, without words of limitation (which devise, standing alone, would give him only a life estate), is followed by a devise over to C D in fee-simple, in the event of A B dying under twenty-one, or dying under twenty-one and without issue, or on the happening of certain other events, then that the effect of such devise over was to enlarge, by implication, the life estate of A B into an estate in fee-simple, determinable on the same event; inasmuch as it was testator's apparent intention that A B should have the fee-simple if such event did not happen. There would be a difficulty (which does not, however, exist in the present case) in coming to that conclusion, if the first devise to A B had been expressly "for his life," as the use of those words would, to some extent, indicate testator's intention that A B should not take more than a life estate. It is also to be observed that, in the present case, both parties contend that the life estate in Dicksgrove, given to John Coltsman junior by the will, should be enlarged by implication, in order to carry out testator's intentions as apparent on the codicil; the plaintiff contending that for such purpose it should be enlarged into an estate tail; and the defendant, on the other hand, contending for its enlargement into an estate in fee-simple, determinable in the event of the failure of the heirs of the body of John Coltsman junior, at his death.

I shall now refer to some cases in which it was held that an estate for life in freehold lands, given by an indefinite devise, was enlarged into an estate in fee-simple, by implication; and it will be seen that in some of them such enlargement was objected to, on the ground that the heir-at-law would be thereby disinherited. That objection does not apply in the present case, as John Coltsman junior, whose estate is alleged to be enlarged, was himself testator's heir-at-law. It will be also seen that, in several of these cases (as in the present one), the party in whose favour the lands were limited by the subsequent devise over was not the heir-at-law of the testator, while in others he was; but that the decision as to the enlargement of the estate given by the previous devise

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T. T. 1865. *Exch. Cham.* was the same. The first case to which I shall refer on the subject is that of *Tomkins v. Tomkins*, cited by Lord Mansfield in *Goodtitle v. Whitby* (a), in which it was held that a devise to the testator's brother, "in trust for his eldest son B, till he should attain twenty-one years, and, if he should die before twenty-one years, then a devise over," gave B an estate in fee, by implication. In *Throgmorton v. Holyday* (b) there was a devise to John H., in terms which, it was held, would have given him only a life estate, but for a subsequent direction that, in case he should happen to die in his minority, "or before he became of age," then the lands should go over; and it was held that, by force of that subsequent direction, John H. took an estate in fee-simple; Lord Mansfield stating [page 1625] that sufficient appeared upon the face of the will to show testator's intention "that John should have the estate unless he should die in his minority;" and Wilmot, J., observing, "Here, is such an intention clearly manifested by the will? The statute only requires a will in writing, but requires no technical words. Therefore, if by sound (not indeed arbitrary) construction it appears that it was testator's intention to devise a fee, it is immaterial what words are made use of; and all the circumstances and clauses are to be united and taken together, in order to collect this intention." Again, in the case of *Doe v. Cundall* (c), where there was an indefinite devise to two parties, on their attaining twenty-one, it was held that the life estate which they would have taken under that devise was enlarged to an estate in fee-simple, by a subsequent direction to the effect that, if either of them should die before twenty-one, his part should go over to the survivor; and Lord Ellenborough, in his judgment, approved of Lord Mansfield's decision and observations in *Throgmorton v. Holyday*, and stated, as the result of other authorities, "that a giving over on a dying before twenty-one shows an intention that, if the party attain twenty-one, he should have a fee absolute." In another case, of *Toovey v. Bassett* (d), where there was an indefinite devise to testatrix's grandchildren, with a subsequent provision that, in case of

(a) 1 Burr. 234.

(b) 3 Burr. 1618.

(c) 9 East, 400.

(d) 10 East, 460.

the death of any of said grandchildren "under age, and without leaving issue," then the share of the grandchildren so dying should go to the survivor, it was held that, by reason of the words "under age," the failure of issue of any grandchild, referred to by testatrix, was a failure at the death of such grandchild; and it was considered clear, upon the authority of *Throgmorton v. Holyday* and *Doe v. Cundall*, that the grandchildren took an estate in fee-simple. Again, in *Marshall v. Hill* (a), where the devise was to testator's eldest son John M., for life, with remainder to the first and other sons of John M. successively (which latter devise, being without words of limitation, would, if standing alone, have given the sons of John M. only life estates), and with a devise over, in case no such son should attain twenty-one, it was held that the eldest son of John M. took an estate in fee-simple. In the case of *In re English* (b), cited by defendant's Counsel, there was an indefinite devise to Andrew English, in trust for his son Richard, with a direction that Andrew should occupy the premises during his life, and then that Richard should succeed him, and also that Susannah, the wife of Andrew, should have them during her widowhood; and the will further provided that, in case Richard should die before his father and mother, then that testator's grandson Charles, if surviving, should be in his place and stead. Richard survived his father and mother; and it was held that he took under the will an estate in fee-simple.

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It has, however, been suggested that there is a material distinction between the several cases to which I have just referred and that now before us, on the ground that, in all those cases, the event upon which the estate was limited to go over related to the first devisee (whose estate was enlarged) dying under a particular age or in the lifetime of another party, although in some of them there was the further contingency of his dying at such period without issue; whereas, in the present case, the event (even adopting defendant's construction) was merely the contingency of John Coltsman junior dying without leaving any heirs of his body living at his death. But it appears to me, upon the principle of those decisions, that this dis-

(a) 2 M. & S. 608.

(b) 2 Ir. Com. Law Rep. 284.

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tion should not affect the result; and that the estate of the first devisee may be enlarged in like manner, although the contingency was to be his death without leaving any such heirs, and not his death at any particular period. I think the direction that the lands should go from the first devisee, and that the subsequent devisee take them in fee-simple, only in the event of the first devisee dying without leaving such heirs, may (as well as the directions in those cases) be relied on as showing testator's intention that the first devisee should have the fee-simple, in the alternative event of his leaving such heirs at his death, and that the former event was the only one in which he was not to have the fee. Mr. *Jarman's* opinion (as stated in vol. 2, c. 33, s. 3) appears to be to this effect; and the decisions in *Robinson v. Grey* (a) and *Hutchinson v. Stephens* (b) show that the enlargement of the estate of the prior devisee into an estate in fee-simple, by reason of a subsequent devise over on the happening of a particular event, may take place, although such event be different from that provided for in any of those other cases to which I have referred. In *Robinson v. Grey* the devise, in substance, was in trust for the three daughters of testatrix, for their respective lives, share alike; and, after the decease of all said daughters, then to the use of all the children of said daughters who should be living at the decease of the survivor of said three daughters, share alike, with a provision that "if all said daughters should die without leaving any issue, that "then, from and immediately after the death of the survivor of "said three daughters," the lands should be in trust for William Robinson and his heirs. William Robinson was the heir-at-law of testatrix; but there was a residuary devise in the will to her three daughters and their heirs; and the Court of King's Bench, on a case sent to them by the Master of the Rolls, certified that such of the children of the daughter as would be living at the death of the survivor of said daughters would take estates in fee as tenants in common. The certificate does not state the reasons; but, from the argument, the ground of the decision appears to have been that, although such children would have taken only life estates under

(a) 9 East, 1.

(b) 1 Keen, 240.

the indefinite devise to them, they would take estates in fee, by implication, by reason of the devise over. Again, in *Hutchinson v. Stephens* (a), the devise was by Wilkinson to Henry Tripp (who was testator's heir-at-law), for his life, remainder to the children of Henry Tripp, at their respective ages of twenty-one, as tenants in common; and, if there should be but one child of Henry Tripp living at his death, then to such one child, at the age of twenty-one, with a devise over to certain other persons, in case said Henry Tripp should "happen to depart this life without leaving any lawful issue of his body living at the time of his decease." It appears, from the statement and argument in the case, that Henry Tripp had only two children—a son and a daughter; that both died in his lifetime; the son being an infant, and the daughter having attained twenty-one, and married, and had several children; that Henry Tripp afterwards died, having devised all his property to a trustee; and that several of his daughter's children survived him: so that the event upon which the devise over was to take effect (namely, his death without leaving any issue then living) did not take place. It was contended that, though the devise to his children was indefinite, and would have given them only life estates, yet that, in the events which happened, his daughter took, under Wilkinson's will, an estate in fee, by implication. This construction was resisted on behalf of the trustee of Henry Tripp's will; but Lord Langdale decided that the daughter's heir-at-law was entitled to an estate in fee;—he did not give in detail the reasons of his decision; but it must have proceeded on the ground that, under Wilkinson's will, the daughter would have taken such estate, by implication. There is, however, a recent case of *In re Pollard's Trusts* (b), the decision in which might appear at first to be at variance with those others to which I have referred. In that case, the testatrix died several years before 1837; and the Lords Justices held that parties to whom certain lands had been given by an indefinite devise (namely, the children of S. L.) did not take an estate in fee-simple, by reason of a subsequent devise over to other parties on an event which did not happen. But the provisions of the will in that case were so dif-

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(a) 1 Keen, 240 b

(b) 32 Law Jour., Ch. 657.

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ferent from those in the will and codicil now before us, that I do not think the decision governs the present case. The devise over, which was relied on, was, as Lord Justice Turner observed, part of a continued series of limitations ; and the event on which the devise over was to take effect did not (as in this case) relate to the death of the party to whom the indefinite devise was made, and to the failure of his issue, but was the death of S. L. (father of the children) "without leaving such issue." According to the construction put by the Court upon the will, those words *did not* import an indefinite failure of S. L.'s issue ; and the event on which the devise over was limited did not take place, as S. L. left several children surviving him. In that case also there was not, as in the present, a clear devise in fee-simple to the same party of other lands which were included with the lands indefinitely devised in one and the same subsequent devise over, so as to indicate testator's intention that both the lands should go together. The two Lords Justices admitted that the question was one of intention apparent upon the whole will, but stated that, with the exception of the devise over, there was nothing in the will before them that indicated any intention to give the children an estate in fee. And Lord Justice Turner, in referring to the cases of *Robinson v. Grey* (a), and of *Hutchinson v. Stephens* (b), did not impugn their authority, but held that they did not go to the length contended for in the case before him. In my opinion, therefore, the decision in that case does not govern the present ; and I think that, having regard to the provisions of the will and codicil now before us, and to the several other authorities to which I have referred, we should hold that the life-estate which John Coltsman junior took in Dicks Grove under the will was enlarged by the codicil into an estate in fee-simple, determinable in the event of there being a failure of the heirs of his body at his death.

The Chief Baron, in his judgment in the Court of Exchequer, refers, as confirmatory of his construction of the codicil, to the direction in it, which provides for *all* the testator's lands (Dicks Grove as well as Flesk Castle) being charged "with the payment of "any reasonable provision made, with testator's consent, by his son

(a) 9 East, 1.

(b) 1 Keen, 240.

“for his (the son’s) wife, to be paid to her during her life.” There might be a difficulty in deciding what effect should be given to this direction, according to its literal construction, in consequence of “testator’s consent” being required for the creation of the charge; but I think that this direction (forming part of the same clause as contains the devise over to defendant) sufficiently indicates testator’s intention that, if any annuity was to be charged under it, such annuity should become payable only in the event of the devise over to defendant taking effect, and that it was also, he presumed, from the nature and object of the charge, that testator intended that such annuity should become payable on the death of his son (if at all); and thus it would appear that testator contemplated the death of his son as being the period when, as well the wife’s rights to such annuity, as also the defendant’s right to the lands, would be definitely ascertained, and when it would be determined, according to the state of facts then existing, whether the devise to defendant was to take effect or not. This seems a more reasonable view of testator’s intention than to suppose that the object of the direction was to provide that an annuity charged under it should become payable on an indefinite failure of the heirs of the body of testator’s son at any future time, and then only in case defendant’s remainder expectant on the estate tail of testator’s son had not been previously barred. This provision for charging an annuity would also show that testator contemplated that the limitations of the codicil should have the same effect as to both denominations. His intention appears to have been that if, in the first instance, the annuity was prospectively charged on both denominations, it should, if it became payable at all, be payable out of both denominations. This would imply that, if the devise over to defendant was to take effect at all, it was to take effect as to both—that it should not fail as to Flesk Castle, while it took effect as to Dicksgrove; which (as I have already mentioned) might be the result, if the construction of the codicil was to give testator’s son an estate in fee-simple in Flesk Castle, with such executory devise to defendant as already mentioned, but to give him an estate tail in Dicksgrove, with remainder to defendant in fee.

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In my opinion this provision, and others in the codicil, clearly indicate testator's intention that both denominations should go together; that the estates taken therein respectively should be the same in one as in the other: and the judgment of the House of Lords, in *Byng v. Byng* (a), particularly that of the Lord Chancellor, shows the extent to which, in such a case, the Court should go in construing a will, so as to carry out that intention. In that case, freehold lands and personal chattels were included in one and the same devise; it was considered that the provisions of the will showed testator's intention that both should go along and be enjoyed together; and it was held that, in order to carry out such intention, the provisions of the will, as to the personalty, might be referred to and used for the purpose of controlling the limitations of the real estate, and giving to those limitations a different construction and effect from what (according to the ordinary meaning of the terms employed) they would have had if they stood alone. With respect to the codicil now before us, it is necessary, in order to carry out testator's intention (as to both denominations being held and enjoyed together), that the words importing the failure of the heirs of the body of testator's son should receive the same construction as to both denominations; and it appears to me that, having regard to the fact of the son having clearly taken an estate in fee-simple in Flesk Castle under the will, and to the authorities to which I have referred, there would be far more difficulty in contending that those words should, as regards Flesk Castle, be construed as importing an indefinite failure of such heirs (so as to give testator's son an estate tail therein) than there would be in holding, with respect to Dicksgrove, that the life estate which the son took therein under the will was enlarged by the codicil into a fee-simple, by implication; and that, accordingly, with respect, as well to Dicksgrove as to Flesk Castle, the failure of the heirs of the body referred to by testator was a failure to take place at the death of the son. I think that our giving to those words, as regards Flesk Castle, the construction of importing an indefinite failure of such heirs of the body, would be

(a) 10 H. of L. Cas. 171.

clearly at variance with testator's intention, as shown by the phrase "at my son's death," and by the other provisions in the codicil to which I have referred, and would be also opposed to the decisions in *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Birks*, and other cases already mentioned; while our adopting the restricted construction of those words, as to Flesk Castle, would not be at variance with any of the cases relied on by plaintiff's Counsel, in all of which the provisions of the will were materially different from those in the present codicil. On the other hand, with respect to Dicks Grove, and the question of testator's son taking therein under the codicil an estate in fee-simple, by implication, it appears to me that the cases to which I have referred on the subject are authorities in favour of that construction, and of our consequently holding that, as to those lands also, the failure of the heirs of the body referred to by testator was a failure to take place at his son's death; and that, accordingly, in deciding how we should construe the will, in order to carry out testator's intention of both denominations being held and enjoyed together, there would be far less difficulty, upon the entire of the codicil, in adopting that construction than in adopting the other contended for by the plaintiff. I think also that the bequest of testator's plate, furniture, and library at Flesk Castle (which is referred to by the Chief Baron in his judgment), may be relied on in support of the construction contended for by defendant, as the terms and nature of the bequest indicate testator's intention that it was to take effect in defendant's favour on the happening of the same event which would entitle defendant to the lands; and this intention could only be carried out by holding that event to be the failure of the heirs of his son's body at the death of his son.

I am, accordingly, of opinion, upon the several grounds I have stated, that, on the death of John Coltsman junior without leaving any issue living at his death, the defendant became entitled to Dicks Grove as well as to Flesk Castle, and that the judgment of the Court of Exchequer should be affirmed.

KROGH, J.

In a case where the authorities are so evenly balanced, I adopt

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In my opinion this provision, and others in the codicil, clearly indicate testator's intention that both denominations should go together; that the estates taken therein respectively should be the same in one as in the other: and the judgment of the House of Lords, in *Byng v. Byng* (a), particularly that of the Lord Chancellor, shows the extent to which, in such a case, the Court should go in construing a will, so as to carry out that intention. In that case, freehold lands and personal chattels were included in one and the same devise; it was considered that the provisions of the will showed testator's intention that both should go along and be enjoyed together; and it was held that, in order to carry out such intention, the provisions of the will, as to the personalty, might be referred to and used for the purpose of controlling the limitations of the real estate, and giving to those limitations a different construction and effect from what (according to the ordinary meaning of the terms employed) they would have had if they stood alone. With respect to the codicil now before us, it is necessary, in order to carry out testator's intention (as to both denominations being held and enjoyed together), that the words importing the failure of the heirs of the body of testator's son should receive the same construction as to both denominations; and it appears to me that, having regard to the fact of the son having clearly taken an estate in fee-simple in Fleak Castle under the will, and to the authorities to which I have referred, there would be far more difficulty in contending that those words should, as regards Fleak Castle, be construed as importing an indefinite failure of such heirs (so as to give testator's son an estate tail therein) than there would be in holding, with respect to Dicksgrove, that the life estate which the son took therein under the will was enlarged by the codicil into a fee-simple, by implication; and that, accordingly, with respect, as well to Dicksgrove as to Fleak Castle, the failure of the heirs of the body referred to by testator was a failure to take place at the death of the son. I think that our giving to those words, as regards Fleak Castle, the construction of importing an indefinite failure of such heirs of the body, would be

(a) 10 H. of L. Cas. 171.

clearly at variance with testator's intention, as shown by the phrase "at my son's death," and by the other provisions in the codicil to which I have referred, and would be also opposed to the decisions in *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Birks*, and other cases already mentioned; while our adopting the restricted construction of those words, as to Flesk Castle, would not be at variance with any of the cases relied on by plaintiff's Counsel, in all of which the provisions of the will were materially different from those in the present codicil. On the other hand, with respect to Dicks Grove, and the question of testator's son taking therein under the codicil an estate in fee-simple, by implication, it appears to me that the cases to which I have referred on the subject are authorities in favour of that construction, and of our consequently holding that, as to those lands also, the failure of the heirs of the body referred to by testator was a failure to take place at his son's death; and that, accordingly, in deciding how we should construe the will, in order to carry out testator's intention of both denominations being held and enjoyed together, there would be far less difficulty, upon the entire of the codicil, in adopting that construction than in adopting the other contended for by the plaintiff. I think also that the bequest of testator's plate, furniture, and library at Flesk Castle (which is referred to by the Chief Baron in his judgment), may be relied on in support of the construction contended for by defendant, as the terms and nature of the bequest indicate testator's intention that it was to take effect in defendant's favour on the happening of the same event which would entitle defendant to the lands; and this intention could only be carried out by holding that event to be the failure of the heirs of his son's body at the death of his son.

I am, accordingly, of opinion, upon the several grounds I have stated, that, on the death of John Coltsman junior without leaving any issue living at his death, the defendant became entitled to Dicks Grove as well as to Flesk Castle, and that the judgment of the Court of Exchequer should be affirmed.

KEOGH, J.

In a case where the authorities are so evenly balanced, I adopt

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T. T. 1865. the views of the Lord Chief Baron, and of my Brother O'HAGAN,
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MONAHAN, C. J.

I thought it was conceded, during the argument, that the devise in the will of the testator John Coltsman, in those words, "I "give, devise and bequeath to my son John Coltsman all those my "property, lands, tenements and premises at and about Fleak Castle, "together with the live stock on said lands; also my plate, library, "pictures, and furniture," were sufficient to pass to testator's only son the *quasi* fee-simple in the Fleak Castle estate, which was held by the testator under a lease for lives renewable for ever. The cases of *Holdfast v. Martin* (a) and *Bentley v. Oldfield* (b), referred to in the Chief Baron's judgment, are quite sufficient authorities for that proposition, if, indeed, any authority were required. It is, I think, equally clear, whatever the intention of testator may have been, and howsoever improbable it may be, that he had a different intention with respect to the lands of Dicksgrove, still, that the legal construction of the devise, "I also devise and "bequeath to my son John Coltsman my lands, tenements and "premises, with the appurtenances thereof, situate, lying and being "at Dicksgrove, near Castleisland, county of Kerry," is to pass only an estate for life to the devisee. And it does not occur to me that there is any other clause or expression in any other part of the will sufficient to alter what occurs to me to be the legal construction of those devises. It, therefore, being assumed that, under the will, the devisee took a *quasi* fee in the Fleak Castle estate, and only a life estate in Dicksgrove, by the codicil the testator directs:—"If it should happen that my son John Coltsman die "without heirs of his body lawfully begotten, or to be begotten, "in that case, and in default of such heirs, I do hereby devise "and direct that my lands, castles, tenements and premises at and "about Fleak Castle; also my lands, tenements and premises "situate at Dicksgrove, all subject to and charged with the pay-

(a) 7 D. & G. 411.

(b) 19 Beav. 225.

“ment of the said annuity to my dear wife of £800 a-year; also
 “with the payment of any reasonable provision made with my
 “consent by my son for his wife, shall, at my son's death, descend
 “and be transferred to my grandson Daniel Cronin, his heirs,
 “executors and assigns for ever; the heir for the time being to
 “add the name Coltsman to the name of Cronin.”

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The questions we have to decide are, what effect should this devise have on the previous devises in the will? It occurs to me, the cases may be considered separately; and I do not think either devise should be materially affected by reason of the other. Now, first, with respect to Flesk Castle, in which, under the will, the devisee took an estate in *quasi* fee; the cases of *Doe v. Frost* (a), *Ex parte Davies* (b), and *Parker v. Birks* (c) decide that, in case of a devise to A in fee, and in case he should die without leaving any lawful issue of his body, the lands, at his decease, were devised to B in fee; that as the event on which the devise over was to take effect was to be determined immediately at or on the death of the first taker, and not at a subsequent period, whenever the failure of issue might take place, that the effect of the devise was not to give an estate tail to the first taker, which would include his issue as objects of the gift, but to leave him the fee-simple in terms given to him, and which fee was to determine on his decease in the given event. These cases have established a very nice, and, what some may be disposed to consider, a subtle distinction between the property being directed to go over at, or on and after the death of the first taker, as in *Jones v. Ryan*, before Sir Edward Sugden, in which case the words “after the death” were held not to mean “immediately after.” Be this as it may, it is impossible now to unsettle the doctrine of *Doe v. Frost* and those other cases; and therefore if in this case the word “issue” had been used instead of “heirs of the body,” I do not see how it would be possible, on any substantial grounds, to distinguish the present case from those to which I have referred. But then it has been said that the words “heirs

(a) 3 B. & Ald. 546.

(b) 2 Sim., N. S. 114.

(c) 1 Kay & J. 155.

T. T. 1865. of the body" have a more strictly technical meaning than the
Esch. Cham. word "issue;" and this is no doubt true in case of an express
COLTSMAN limitation to "heirs of the body." And there are several cases
v. in which an express limitation to "issue" or "children" has been
COLTSMAN. held to confer an estate for life only, or in fee, to such children
or issue; when, perhaps, if the limitation had been, in similar
words, to "heirs of the body," the legal construction would have
been an estate tail to the first taker, so as to include as objects
of the gift the heirs of the body, or issue. But, in a case like
the present, where there is no express gift to the heirs of the
body, but the express gift is to the father in fee, and, on his
decease the estate is to go over on a failure of issue, or of heirs
of the body, I can see no possible distinction between the two
cases. When once we arrive at the conclusion that the estate
is to go over, if at all, on the death of the first taker, it is per-
fectly clear that, if at that moment there be a failure of issue,
so also is there a failure of heirs of the body; and, therefore, I
cannot see any reasonable grounds for a different rule or con-
struction in the two cases: and, though I am aware that this is
the first time that the rule in *Doe v. Frost*, and the other cases,
has been applied to a default or failure of heirs of the body, still
I have no difficulty in holding that the rule should be the same
in both cases; and I therefore am of opinion that, under the
will and codicil, John Coltsman, the devisee, took an estate in
fee-simple, and that same was not in any way cut down to an
estate tail; and that, on the death of John Coltsman the younger
without issue, testator's grandson Daniel Cronin took an estate
in fee by conditional limitation; and, therefore, that John Coltsman
the younger had no power to defeat that limitation over; and, there-
fore that, as to the Flesk Castle estate, the plaintiff has no title.
With respect to Dicksgrove, the case is attended with much greater
difficulty; the general devise in the will being *per se* sufficient
to carry only a life estate to John Coltsman the younger. Is the
effect of the codicil to enlarge this estate to an estate tail, or an
estate in fee-simple? With respect to an estate tail, if I am right in
the conclusion to which I have come, that the death without heirs of

the body, mentioned in the codicil, was an event to take effect, if at all, immediately on the death of John Coltsman the younger, it is not possible to hold that they can have the effect of enlarging the life estate to an estate tail, without giving them a different meaning as to the two estates. This is so evidently contrary to the intention of the testator, that it appears to me impossible to adopt it; and, therefore, I cannot hold that John Coltsman the younger took an estate tail in the Dicksgrove estate. Still the question remains, is the life estate given by the will enlarged to an estate in fee-simple? or does it continue merely an estate for life, with a contingent remainder to Daniel Cronin, in the event of there being no heirs of the body of John Coltsman on the determination of his life estate? This is all-important as to the rights of the parties, as, if the estate of John Coltsman continued merely a life estate, with a contingent remainder to Daniel Cronin in fee, which ultimate fee vested in John Coltsman, as heir-at-law of the testator by descent, the result would be, that the contingent remainder would have been defeated by the disentailing deed executed by John Coltsman; and the plaintiff, as his devisee, would not be entitled to this portion of the estate. Still the question is, does the devise in the codicil enlarge the life estate to an estate in fee? Several cases have established that if lands are devised in general words sufficient to create only a life estate to A, and, in the event of A's dying under twenty-one, or any other age, to B in fee, that the devisee takes an estate in fee, determinable on his dying under the prescribed age, and not merely a life estate: *Doe v. Cundall* (a). And this doctrine has been applied to the case of a devise over in the event of the first devisee dying under twenty-one, and without issue living at his decease: *Toovey v. Bassett* (b). The cases on this subject are collected and commented on by Mr. Jarman, in his *Treatise on Wills*, p. 223 of the second edition, and more fully in the third edition of *Powell on Devises*, vol. 2, p. 399; and he draws from them the conclusion that the estate should be enlarged to an estate in fee, though the devise over was merely in the event of the first devisee dying without issue living at his

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(a) 9 East, 400.

(b) 10 East, 460.

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decease. And I confess it occurs to me that all the reasons which exist for holding that the general devise is enlarged by a devise over in the event of the general devisee dying under a certain age, equally apply to a devise over in the event of the general devisee dying without issue living at his decease. Let us consider how the case would be if the first devisee was not the heir-at-law of the testator, and the devise was to A, and, in the event of his dying without issue living at his decease, then at his decease to B in fee—unless the estate of A was enlarged to an estate in fee, the result would be, that if A died without issue, the property would pass to B; but, if he left issue, the property would not go to the issue as his heir-at-law, or otherwise, but to the heir-at-law of the testator; which certainly would be attributing to the testator an intent so capricious, if not absurd, which is the reason assigned for not adopting it in the cases to which I have referred. If, therefore, in the present case, John Coltsman the devisee was not the heir-at-law of the testator, it occurs to me that the principle of the cases to which I have referred, particularly *Toovey v. Bassett*, would apply, and enlarge his life estate to an estate in fee-simple; and it does not occur to me that the fact of the devisee being heir of the testator can vary the construction of the will and codicil; and therefore, though with some doubt, I am opinion that, for the reasons I have stated, the effect of the codicil was to enlarge the estate for life in Dicks Grove to an estate in fee.

Another view has suggested itself, namely, John Coltsman being heir-at-law of the testator; if matters had rested on the will alone, he would have taken an estate in fee in both estates, partly by descent as to Dicks Grove; so that the codicil may be considered as operating on previous estates in fee-simple in both denominations, so as to bring both cases within the rule in *Doe v. Frost*. This, however, is not the ground on which I think it right to rest my judgment; I merely refer to it as having occurred to me.

On the whole, however, I come to the conclusion that in both cases the devisee John Coltsman took an estate in fee, with a contingent limitation over; and, therefore, that the plaintiff has no title

to either estate; and, therefore, that the judgment of the Court of Exchequer should be affirmed as to both estates.

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LEFROY, C. J.

In my opinion it is impossible to arrive at the proper and legal construction of the testamentary disposition in this case, without taking the will and codicil together. The testator by his will gives to his son John Coltsman "all those his property, lands, tenements and premises at and about Flesk Castle." Those words gave to John Coltsman junior either an estate in fee or an estate for life; but it is immaterial to the present case to decide that point. The will proceeds:—"I also devise to my son John Coltsman my lands, "tenements and premises situate at Dicksgrove." Under this devise John Coltsman junior took an estate for life in Dicksgrove; for there are no words on which to ground any augmentation of the estate. The codicil runs thus:—"And, if it should happen that my "son John Coltsman die without heirs of his body lawfully begotten, "or to be begotten, in that case, and in default of such heirs, I "hereby devise that my lands at and about Flesk Castle, mentioned "in my said will, together with the plate, furniture, and library, "also my lands situate at Dicksgrove, shall, at my son's death, "descend to my grandson Daniel Cronin, his heirs, executors and "assigns, for ever; the heir for the time being to add the name "of Coltsman to the name of Cronin. Also, if it should happen "that my son John Coltsman die without heirs of his body lawfully "begotten, or to be begotten, in that case, and in default of such "heirs, I give the sum of £6000 to my daughter Mary Godfrey."

I am of opinion that by the codicil the testator intended to create an estate tail in John Coltsman junior, and that such estate was duly created in both denominations. What other meaning can be given to the words "heirs of his body," and "such heirs," and to the direction that the heir for the time being should take the name of Coltsman? That being so, and John Coltsman junior having barred the estate tail, the conditional order for a new trial obtained by the plaintiff in error should be made absolute.

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PARKER, a Minor, by his next friend, v. CATHCART.*

(*Common Pleas*).

Jan. 25, 30.

The measure of damages in an action upon an apprenticeship deed, for wrongful dismissal, is the loss actually sustained by the specific breach of covenant complained of up to the time of action brought; and the jury, in such an action, cannot, therefore, take into consideration the possible injury the plaintiff may have sustained by reason of his wrongful dismissal, as such damages are not damages in the ordinary course of things flowing from the breach.

Where there has been a misdirection at the trial, the Court above has no discretion to refuse to set aside the verdict.

THIS case came before the Court on motion on the part of the plaintiff, to show cause why a conditional order for a new trial, made on the 4th of November preceding, upon the ground of misdirection by the learned Judge who had tried the case, should not be made absolute. The case had been tried before Mr. Justice Hayes, in the county of Louth, at the Summer Assizes for 1865. The plaintiff, still a minor, had been, in the year 1861, apprenticed to the defendant, a hardware merchant, for the purpose of learning his business, under a formal deed of apprenticeship; but differences had subsequently arisen between them, which resulted in the present action. The writ of summons and plaint contained five paragraphs. In the first the plaintiff complained that, in breach of a covenant contained in the said deed of apprenticeship, the defendant would not teach or instruct the plaintiff, nor provide him with board and lodging, but discharged him from his service, and would not suffer him to remain. In the second paragraph a parol agreement to maintain the plaintiff during the term of his apprenticeship was declared upon, and a breach thereof alleged. The third paragraph complained of an assault and false imprisonment; the fourth was for detainue; and the fifth for money had and received. The defendant traversed the causes of action alleged in the second and fifth counts, and paid into Court sums of £10, £1. 10s. 0d., and 10s., upon those alleged in the first, third, and fourth paragraphs respectively. It appeared in evidence that the plaintiff had been frequently ordered by the defendant not to stay out after half-past eight o'clock at night, and that having, in disobedience to those orders, stayed out one night until half-past nine o'clock, he was, on coming home, refused admittance, and was

* *Coram* MONAHAN, C. J., CHRISTIAN, and O'HAGAN, JJ.

informed the next morning that he would not be permitted to return. Mr. Justice Hayes, in charging the jury, at first left the case to them generally, upon the first and third paragraphs; but afterwards, at the request of defendant's Counsel, informed them that they could only take into consideration the damages which had actually accrued before the commencement of the action; but also told them that they might, in estimating their damages, take into consideration the injury to plaintiff's character which had resulted from the circumstances of his dismissal. To this latter direction the defendant's Counsel objected. The jury then found for the plaintiff on the first and third counts, assessing damages at £40 beyond the sums lodged in Court, and for the defendant upon the second, fourth, and fifth counts. In answer to a question of the learned Judge, they also stated that they had estimated the damages chiefly in reference to the injury done to the plaintiff's character, which they considered ruined by the dismissal. It was then suggested that separate findings should be taken upon the first and third counts; and the jury thereupon assessed damages upon the first count at £30, and upon the third, £10.

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Harrison and M'Blaine showed cause.

We do not question the authority of the case of *Lewis v. Peachey* (a), cited on the part of the defendant in the Court below, that the only damages that were recoverable in the present action were those which had accrued before action. The jury were, however, right in acting upon their opinion, that the damages arising from loss of character had accrued once for all, and therefore fell within that category. Injury to character, resulting from the circumstances of the dismissal, is a proper element of damages in an action upon an apprenticeship deed, inasmuch as it naturally follows from the wrongful act: *Hadley v. Baxendale* (b); *Smith v. Thompson* (c). The latter was, like the present case, an action of *assumpsit*.—See, also, *Chitty on Contracts*, 7th ed., p. 789, as to actions like the present, savouring of tort. In actions for breach of promise

(a) 1 H. & C. 518.

(b) 9 Exch. 354.

(c) 8 C. B. 44.

H. T. 1866. of marriage, damages of a similar kind are always given. The
Common Pleas. misconduct of an apprentice does not release the master from his
 PARKER engagement with him: *Winstone v. Linn* (a). Substantial justice
 v. having been done, the Court should not, under any circumstances,
 CATHCART. grant a new trial: *Lush's Practice*, 3rd ed., p. 629; even if there
 have been a misdirection: *Moore v. Tuckwell* (b); *Edmondson v.*
Machell (c).

Falkiner and *Samuel Ferguson*, in support of the rule.

This is not an action for wrongful dismissal by a servant against his master, but an action upon a covenant in an apprenticeship deed, which stands upon a very different footing: *Winstone v. Linn*; *Philips v. Clift* (d); and the case of *Smith v. Thompson* is not therefore in point. There is a continuing breach during each moment of the continuance of the term of apprenticeship: *Lewis v. Peachey* (e); *Hambleton v. Veere* (f). The damages given for loss of character were too remote, and were not the natural and legal consequence of the act complained of: *Vicars v. Wilcocks* (g); *Kelly v. Parkinson* (h). In actions upon contracts no damages will be given which cannot be stated specifically; and the case of a contract of marriage has always been considered an exceptional one: *Hadley v. Baxendale* (i); *Hamlyn v. The Great Northern Railway Company* (h); *Williams v. Reynolds and another* (l); *Mayne on Damages*, p. 16; *M'Kean v. Cowley* (m). Another reason why damages for loss of character cannot be given in the present action is, that character is not in issue upon the record, so as to have enabled us, if we had thought it advisable, to go into evidence to show that the plaintiff had no character to lose.

Cur. adv. vult.

(a) 1 B. & C. 460-7.

(b) 1 C. B. 609.

(c) 2 T. R. 4.

(d) 4 H. & N. 168.

(e) 1 H. & C. 518.

(f) 2 Wms. Saund., part 2, 170.

(g) 2 Sm. Lead. Cas., 5th ed., p. 461.

(h) 5 B. & Ad. 645.

(i) 9 Exch. 354.

(k) 1 H. & N. 408.

(l) 34 Law Jour., N. S., Q. B. 221.

(m) 7 Law Times, N. S. 828.

MONAHAN, C. J.

The action in this case is brought upon an apprenticeship deed, by an apprentice against his master, for a wrongful dismissal before the due expiration of the apprenticeship by efflux of time. There is also a count in the summons and plaint for an assault. The jury have found for the plaintiff on both counts, and assessed the damages on the two counts at £30 and £10 respectively. The case was tried at considerable length at the last Dundalk Assizes; and a good deal of evidence gone into on both counts. The only question upon which it will be now necessary for us to give an opinion is one arising on the count for wrongful dismissal.—[His Lordship here referred incidentally to the facts proved upon the assault count.]—The indenture of apprenticeship upon which the action has been brought bears date July 1861; and the alleged breach having occurred in March 1865, the action was commenced in May 1865, more than a year before the term of the apprenticeship would naturally have expired. It appears that at first the learned Judge left the case to the jury without any precise direction as to the principle upon which the damages were to be calculated. Mr. *Falkiner*, for the defendant, then asked the learned Judge to direct them that they could take into account only the damage which had arisen up to the commencement of the action. To this he assented; and the jury then retired; but, after a short time, came out, and asked the learned Judge whether they might take into account the injury to the plaintiff's character occasioned by the wrongful dismissal of him from his master's employment before the period of his apprenticeship had expired. The learned Judge told them that they might; and they then found for the plaintiff, with £40 damages. Mr. *Falkiner* objected that any injury alleged to have arisen from any supposed loss of character, in consequence of the dismissal, was entirely of a speculative character, and was too remote, and ought to be withdrawn from the consideration of the jury; but the learned Judge did not accede to this request. The question then arises, whether, under those circumstances, the verdict can be maintained? The cases

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H. T. 1866. of *Philips v. Clift* (a) and *Lewis v. Peachey* (b) have been referred
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to in the course of the argument, and establish the principle that the covenants in an apprenticeship deed continue in force during the whole period of the apprenticeship, and that the misconduct of an apprentice will not justify the master in refusing to comply with his part of the agreement, by ceasing to employ him. It is also clear that the true measure of damages is the loss actually sustained (up to the time of action brought) by the specific breach of the covenant. We have no ground for saying that the damages were excessive; but, upon the ground that the jury were inaccurately directed, we must grant a new trial. We must take the law as we find it; and, in the case of a mistake amounting to a misdirection, like the present, we have no discretion, and must set aside the verdict. The result will be, that, upon a new trial, a proper amount of damages will be assessed; and, if the plaintiff should be advised to bring another action, at a future time, for the continued breach, the verdict in the first action will be no bar to this right. Of course I offer no opinion whether or not the facts would support a further action. All we now decide is, that, in an action of the present kind, damages to character are not damages in the ordinary course of things flowing from the breach, and that the verdict must be set aside for misdirection. Let each party abide his own costs of the former trial, and of this motion.

Cause shown allowed.—No costs.

(a) 4 H. & N. 168.

(b) 1 H. & C. 518.

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Common Pleas.

THOMAS v. TILLIE & HENDERSON.

May 11.

THIS was a motion for liberty to exhibit certain interrogatories to the defendants. The plaintiff was Mr. W. T. Thomas of London, patentee and manufacturer of sewing machines; and the action was brought for an alleged infringement of his patent right by the defendants, who are shirt and collar manufacturers in London-derry. The motion was made before any defence was filed, and was not on notice. It was grounded upon the joint affidavit of the plaintiff and Mr. Robert Campbell Lee, of the firm of Messrs. Anderson & Lee, his attorneys in the case, which stated that an action had been brought by the plaintiff, and was then pending in this Court, for the infringement of certain letters patent granted to the plaintiff for the term of fourteen years from the 27th of April 1853, for the sole privilege to make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, his said invention for improvements in the apparatus for sewing and stitching; that machines made by him under the said letters patent had gained great repute, and very large numbers of them had been, and still continued to be sold; and the trade in them had become so valuable that an organised system of infringement had been established, chiefly by small makers, who, having obtained possession of one of his machines, made castings of it, and supplied manufacturers with machines, much below his ordinary price; and some of these persons had, together with their customers, formed an association for resisting any proceedings which might be brought against them. That the defendant had, as plaintiff had been informed and believed, made or used, or caused to be made or used, sewing machines, in exact imitation of those made and sold by him, constructed according to the letters patent before referred to; and both the said deponents stated that they believed that the plaintiff

Common Law Procedure Act 1856, ss. 56-7. Form and extent of interrogatories which may be exhibited to a defendant in an action for the infringement of letters patent, before plea pleaded. Such motions need not, in this Court, be upon notice.

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would derive material benefit in this cause from the discovery which was sought by requiring the defendant to answer the annexed interrogatories; also, that the plaintiff had a good cause of action on the merits.

The interrogatories annexed were as follows:—

1. "Are you not well acquainted with the particular construction
 "of the sewing machines made and sold by the above-named plaintiff,
 "constructed according to the letters patent granted to him on the
 "27th of April 1853? and have you not purchased from other per-
 "sons than the plaintiff sewing machines known in the trade as the
 "'Imitation Thomas Machines,' or being constructed similar to the
 "machines made and sold by the above-named plaintiff as his
 "patent machines, or having the peculiar mover or stopper, which,
 "whilst it is the means of holding the fabric during the insertion
 "and withdrawal of the needle, is also the means by which the
 "step by step motion is given to the fabric during the succession
 "of stitches; and, if so, state the number of such machines, and
 "the dates when, and the persons from whom the same were
 "purchased?"

2. "How many machines similar to the machines sold by the
 "plaintiff as his patent machines, and having the peculiar mover
 "or stopper above referred to, have you ever had in your possession,
 "custody, or control, used for the purpose of your business, or in
 "the hands of persons working for you, which, to your knowledge,
 "have not been made or sold by the plaintiff; state where such
 "machines now are, and the length of time each of such machines
 "has been at work?"

3. "Have you not made, or caused to be made, sewing machines
 "having the combined stopper or mover referred to in the first of
 "these interrogatories; and, if yea, state how many machines you
 "have so made, or caused to be made, and whether such machines
 "have been used by you in your business, or whether they have
 "been sold to other parties; and, if so sold, state the dates when,
 "and the parties to whom you sold the machines, and the prices
 "which you received for them?"

Robert Anderson, for the plaintiff.

This action is one of a series of actions of a similar character brought by the same plaintiff in this country and in England; and similar interrogatories have been allowed upon a like affidavit, by the English Court of Common Pleas. The motion in England is not reported.

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Motion granted.

DEVEREUX v. MORRISSEY.

M. T. 1865.
Nov. 24, 25.

DEMURRER.—The action in this case was brought under the Summary Procedure on Bills of Exchange (Ireland) Act 1861, by Mr. Nicholas Devereux of Calthbridge, Wexford, against Mr. Laurence Morrissey of King-street, in the city of Dublin; and the writ of summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £4000 sterling, for that the defendant, on the 19th day of February, in the year of our Lord 1862, at Richmond, in the State of Virginia, in North America, in parts beyond the seas, by his foreign bill of exchange, in writing, now overdue, directed to one Martin Morrissey, required the said Martin Morrissey to pay to the order of the plaintiff £1000 sterling, sixty days after sight of that his first of exchange (second and third of same tenor and date not paid); and the said bill was duly presented for acceptance, and was dishonoured, whereupon the said bill was duly protested for non-acceptance thereof; of all which the defendant had due notice, but did not pay the said bill; and by reason of the premises the plaintiff incurred expense in and about the presenting, noting, and protesting and re-exchange of the said bill, and incidental to the dishonour thereof: and for that the defendant, on the 19th day of March, in the year of our Lord

It is not necessary, in an action against the drawer of a bill, for non-acceptance, to aver the delivery of the bill to the plaintiff. In an action from the non-acceptance of a foreign bill, where the bills have been drawn in sets of three, it is not necessary to aver either the non-acceptance or non-payment of the second and third bills.

It is no ground of demurrer to an action under the Summary Procedure on Bills of Exchange (Ireland) Act 1861, that the plaintiff does not aver that the cause of action arose

within six months before action brought.

M. T. 1865. 1862, at Richmond aforesaid, in parts beyond the seas, by his other
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DEVERREUX foreign bill of exchange in writing, now over due, directed to the
v. said Martin Morrissey, required the said Martin Morrissey to pay
MORRISSEY. to the order of the plaintiff £1000 sterling, sixty days after sight
of that his first of exchange (second and third of same tenor and
date not paid); and the said last-mentioned bill was duly presented
for acceptance and was dishonoured, whereupon the said last-
mentioned bill was duly protested for non-acceptance thereof;
of all which the said defendant had due notice, but did not pay
the last-mentioned bill; and by reason of the premises the plaintiff
incurred expense in and about the presenting, noting, and pro-
testing of the said last-mentioned bill, or otherwise incidental to the
dishonour thereof; and for money payable by the defendant to
the plaintiff for money found to be due from the defendant to the
plaintiff.

On the 3rd day of November, Counsel for the defendant moved
the Court, on notice, to set aside the first and second paragraphs
of the writ of summons and plaint, on the ground that the
said paragraphs were embarrassing and defective, inasmuch as
it was not averred or shown by either of the said paragraphs that
the bills therein sued upon became due or payable within six
months before action brought, and no facts were set forth therein
entitling the plaintiff to sue the defendant on foot of the said bills,
or either of them, under the Summary Procedure on Bills of
Exchange (Ireland) Act 1861; and also because no facts were
disclosed in or by either of the said paragraphs which gave plaintiff
any title to sue defendant on foot of either of the said bills, by
reason of any indorsement or delivery to him of either of the said
bills, or otherwise howsoever: and in the event of the Court de-
clining to set said paragraphs of the plaint aside, for liberty to demur
to the two said paragraphs, on the grounds that the same, for
the reasons set forth aforesaid, disclosed no cause of action good
in substance. The defendant made no affidavit of merits. The
Court refused to set aside the two paragraphs, but gave the de-
fendant leave to demur.

The defendant accordingly pleaded to the said first and second

paragraphs of the writ of summons and plaint, that the said counts, or either of them, do not disclose any cause of action good in substance; because the action brought in this case is not an action on a bill or promissory note within the Summary Procedure on Bills of Exchange (Ireland) Act 1861; and because it is not alleged in said counts, or either of them, nor does it appear by necessary intendment from any allegation contained therein, that the said bills became due or payable within six months before action brought; and because no title in said bills, or right to sue thereon, is shown by delivery or otherwise; and because it does not appear that the said Martin Morrissey did not accept either of the other two bills of same tenor and date in first count mentioned, or either of the other two bills of same tenor and date in second count mentioned, prior to the time that the bills sued on were presented for acceptance; and because it does not appear that either of the two other bills of same tenor and date in second count mentioned were not paid at the time the bills sued on, or either of them, were presented for acceptance. The defendant traversed the statement of accounts alleged in the third paragraph of the writ of summons and plaint.

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The points of demurrer were:—

1. That this case is not an action on a bill or promissory note within the Summary Procedure on Bills of Exchange (Ireland) Act 1861.
2. That it is not alleged in the first or second counts of the writ of summons and plaint, or either of them, nor does it appear by necessary intendment from any allegations contained therein, that the said bills, or either of them, became due or payable within six months before action brought.
3. That no title in said bills, or either of them, or right to sue thereon, is shown by delivery or otherwise.
4. That it does not appear that the said Martin Morrissey did not accept either of the other two bills of same tenor and date in the first count mentioned, or either of the other two bills of same tenor and date in the second count mentioned, prior to the time that the bills sued on were presented for acceptance.

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5. That it does not appear that either of the two other bills of same tenor and date in the first count mentioned, or either of the two other bills of same tenor and date in the second count mentioned, were not paid at the time the bills sued on, or either of them, were presented for acceptance.

Sidney, and *Quin*, in support of the demurrer.

In this case there must be judgment for the defendant, for several reasons:—

First; because there is no averment in the writ of summons and plaint of any delivery of the bill alleged to be sued upon to the plaintiff; and such averment is a material and necessary one, for there is no doubt that, if the bill was not delivered, the plaintiff could not recover upon it; and the substantial question therefore is, whether or not it is essential to set out the delivery upon the face of the plaint in order to enable us to traverse the averment. The general principle of pleading is that everything necessary to constitute the cause of action should be set out; and this has not been done. There is no doubt that where the acceptance of a bill is admitted upon demurrer, it must be taken to have become a perfect acceptance, which implies delivery; but where the gist of the action is, as in the present case, *non-acceptance*, there can be no such presumption. This distinction is apparent from the judgment of Crampton, J., in *Conway v. Lewis* (a) (which was an action by the payee against the maker of a promissory note, in which the declaration did not aver delivery), where he said:—"The declaration is a departure from the settled forms without any necessity. In all the precedents of declarations by payee against the maker of a promissory note, I do not find one omitting the averment of delivery; nor is there a case to establish that such averment is unnecessary. That it is unnecessary is now said to be clear, both on principle and on authority. The authorities we have been referred to are, however, all decisions on bills of exchange. If it were a mere matter of principle, I should say that it is not necessary that a declaration on a bill of exchange should

(a) 8 Ir. Law Rep. 8.

“state a delivery; for the averment is, that the plaintiff (the
 “drawee) made his bill of exchange, and directed the same to the
 “defendant, who accepted it, and thereby promised to pay the payee
 “(the plaintiff) a sum of money, according to the time and effect
 “thereof; thus stating a promise to pay the amount to the plaintiff,
 “to whom, by necessary implication, the bill was delivered. In
 “the case of *Churchill v. Gardiner* (a), I find the declaration first
 “stating the drawing of the bill, and then that the defendant
 “accepted it, and thereby became liable to pay the amount to the
 “plaintiff. Now, what is the demurrer to that? It is merely that
 “the drawer did not deliver the bill to the plaintiff. That demurrer
 “was overruled, and properly. It was to be presumed that the bill,
 “when accepted, was delivered to the party entitled to the payment
 “of it—that was, to the payee. And, in the case of *Smith v*
 “*McClure* (b), Lord Ellenborough* says, ‘That the acceptance of
 “‘a bill, which was admitted by the demurrer, and must be taken
 “‘to be a perfect acceptance, vested a right in the drawer to sue
 “‘upon it.’ In *Churchill v. Gardiner*, the Court say that this mode
 “of declaring was warranted by precedent. Those cases on bills of
 “exchange do not decide, that when the payee declares against the
 “maker of a promissory note it is unnecessary to aver delivery.”
 It will be observed that the very thing which Crampton, J.,
 relies upon as making it unnecessary to aver delivery in a decla-
 ration upon a bill *by the drawer against the acceptor*, is the very
 element which is absent from the present case—the acceptance. It
 is true that in this case the two Judges who, on that occasion, con-
 stituted the Court of Queen’s Bench, were divided in opinion; but
 the judgment of Perrin, J., does not touch the present case.

Secondly; because, after admitting on the face of the plaint that
 the bills were drawn in sets, the plaintiff does not go on to aver the
 non-payment and non-acceptance of the second and third bills;
 which non-payment and non-acceptance are conditions precedent to
 plaintiff’s right of action. In *Chitty on Pleading*, 5th ed., p. 172,
 and in *Chitty (jun.) on Pleading*, by Pearson, 2nd ed., p. 97, forms
 of declarations are given, setting out the non-acceptance and non-

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(a) 7 Term Rep. 596.

(b) 5 East, 476.

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MORRISSEY. payment of the two other bills; and, if in fact the bills in the present case were not accepted or paid, that fact ought to have been stated. The case of *East v. Effington* (a) is a distinct authority that, though in such a case as the present, the non-avertment of the non-payment of the two other bills cannot be taken advantage of *after verdict*, it would be a good ground of demurrer.

Thirdly; because the writ of summons and plaint, though purporting to have been brought under the Summary Procedure on Bills of Exchange (Ireland) Act 1861 (24 & 25 Vic., c. 43), does not indicate in any way that the cause of action arose within six months. This is not a mere irregularity, but is a substantial objection.—[See observations of Cockburn, C. J., in *Leigh v. Baker* (b)] :—"It is more than irregularity; the Act altogether "changes the procedure." And, again :—"If the case is one which "is not within the statute, the necessary consequence is, that the "whole proceedings fall to the ground. The statute gives the "Court a new summary jurisdiction, to be exercised only in special "circumstances. If the writ has issued in a case in which the "provisions of the Act do not apply, the whole proceedings are "*coram non Judice*," &c., &c. It is a condition precedent to the bringing of such an action, that the cause of action should have accrued within six months; and, as such, it should have been pleaded, in order to sustain the plaint. In Lord Campbell's Act (9 & 10 Vic., c. 93), section 3, there is a provision that the action therein referred to should be commenced within twelve months, and the practice has always been to aver, upon the face of the plaint, that the cause of action arose within twelve calendar months next before the suit. There is a considerable analogy between the latter statute and the Summary Bills of Exchange Act, inasmuch as both statutes create a remedy unknown to the Common Law.

Dowse and *J. B. Murphy*, in support of the plaint.

First; the averment of delivery is unnecessary, especially since the passing of the Common Law Procedure Act 1853 (16 & 17 Vic.,

(a) 2 Lord Ray. 810.

(b) 2 C. B., N. S. 373.

c. 113), which, in schedule C, gives a form of plaint omitting the averment of delivery. M. T. 1865.
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Secondly; the allegation that the money mentioned in the bill was not paid, supplies the place of an averment that the other bills of the set were not paid: *Starke v. Cheeseman* (a); because the whole set, of how many parts soever it be composed, constitutes but one bill; and the regular payment and cancellation of any one of the parts extinguishes all: *Byles on Bills.*, 7th ed., p. 341. For a similar reason, the allegation of the non-acceptance of one of the bills of a set amounts to an allegation of the non-acceptance of any: *Wegersloff v. Keene* (b). This case is also an authority upon the non-payment point (c). The form of declaration given in *Bullen & Leake's Precedents of Pleadings*, 2nd ed., p. 88, does not contain any averment of the non-payment or non-acceptance of either of the other bills of the set. DEVEREUX
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The plaintiff must have judgment.

Demurrers disallowed.

(a) Carthew's Rep. 509.

(b) 1 Strange, 214.

(c) See page 224.

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Jan. 12, 31.

1. The Court may take judicial notice of the persons who filled the great Offices of State so long ago as 1803.

2. The fact that, the balance on foot of a debtor and creditor account is struck in favour of the party having made the entry and since deceased, does not prevent the entries in the account from being admissible in evidence as entries against interest.

3. Entries of a debtor and creditor account, in the books of a deceased attorney, are not to be admitted as evidence, merely because there are items on the other side of the account that are admitted.

4. The facts of the present case bring it within the rule in *Doe d. Kinglake v. Bevis* (7 C. B. 456), and not within the rule in *Higham v. Ridgeway* (1 East, 109).—CHRISTIAN, J., *dubitante*.

5. The Court cannot go behind the bill of exceptions on the record to ascertain what the objections made at the trial really were.

6. The affidavit of a deceased solicitor, made and filed in the course of a Chancery suit, may be admitted in evidence in conjunction with an order of the Court made upon a motion in the suit shortly afterwards, although it does not appear on the face of the order that the affidavit was used upon the motion.

QUARE IMPEDIT.—The action in this case was brought by Richard William Whaley against the Right Honorable John Skeffington Viscount Massareene, John Carlisle, Roger Bickerstaff, clerk, incumbent of the advowson of Killead, and the Right Rev. Robert Knox, Lord Bishop of Down and Connor, to recover said advowson, the fee-simple of which he claimed to be entitled to. The case had come to trial on four occasions, and had resulted in different verdicts; but, owing to some fatality, these trials had proved abortive on the three former occasions, and the case now came before the Court on cross bills of exceptions, on the grounds of the reception of illegal evidence and of misdirection respectively.

The principal question raised upon the pleadings was, whether a deed, bearing date the 12th day of June 1793, made between Sir Clotworthy Skeffington Earl of Massareene, did really pass all the interest of the said Earl of Massareene in the said advowson, as it purported to do, or whether it was executed by the grantor upon the representation of the grantee that it merely passed the right to the next presentation, and was fraudulent and void to any further extent. Evidence was, on the part of the defendant, given to show that in the year 1797 the defendant's ancestor, Lord Massareene, had filed a bill in the Court of Chancery for the purpose of having the deed set aside, and had obtained a rule *nisi*, Whaley not appearing; also that Whaley had, in the year 1802, commenced an action of *quare impedit*, which action he did not

follow up; and it was suggested that these two circumstances tended to show that Whaley must have felt that he had no reliance upon being able to sustain the validity of the deed. The plaintiff then went into a rebutting case, for the purpose of explaining why the Chancery proceedings had been unopposed and the *quare impedit* proceedings stopped, by showing that Colonel William Whaley had been detained in France by Napoleon Buonaparte, during the war which commenced in 1803 between the United Kingdom and France; and that the said William Whaley had, at all other times, done all that in him lay to assert and maintain his rights under the said deed. For this purpose, certain evidence was put in by the plaintiff, which was excepted to by the defendant.

There was also another bill of exceptions taken by the plaintiff, but the questions arising thereon were not argued.

Defendants' Bill of Exceptions.

To sustain the said replications and the issues joined therein, the Counsel learned in the law of the said plaintiff, did then and there produce, as a witness for and on behalf of the plaintiff, the plaintiff Richard William Whaley, who, being sworn, deposed that he was the son of Colonel William Whaley deceased; that he was now sixty-five years of age; that when he was a boy, he was at school at Edinburgh; that in August or September 1815 he was brought up from school to London to see his father on his return from France; that this was the first time he had ever seen his father, who had been detained a prisoner of war in France as a *detenus* by Napoleon Buonaparte, during the war which commenced in 1803 between the United Kingdom of Great Britain and Ireland and France. And the said witness then produced a certain deed, purporting to bear date the 12th of June 1793, and to be made between the Right Honorable Clotworthy Skeffington, Bart., Earl of Massareene, of the one part, and William Whaley, of the other part, whereby the said Earl of Massareene, for the considerations therein mentioned, purported to grant to the said William Whaley the advowson of the said rectory of Killead; and a certain other deed purporting to bear date the 9th day of August 1798, and to be made between William Whaley, of the one part, and Bernard

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H. T. 1866. Ward, of the other part, whereby the said William Whaley, for
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 CARLISLE. the said Bernard Ward the said advowson of the said rectory of
 Killead; and a certain other deed purporting to bear date the
 1st day of April 1801, and to be made between Bernard Ward,
 of the one part, and William Whaley, of the other part, whereby
 the said Bernard Ward, for the considerations therein mentioned,
 purported to grant to the said William Whaley, his heirs and
 assigns, the said advowson to the said rectory of Killead; and
 deposed that he had first seen the said deeds in the custody of one
 Leland, his said father's solicitor, in the year 1818; and which
 deeds are by the defendants admitted to come out of the proper
 custody, and the signature to which said deed of the 12th day of
 June 1793 was admitted by the defendants to be in the handwriting
 of the said Clotworthy Skeffington Earl of Massareene; and, on
 being cross-examined, deposed that he had presented the Reverend
 Skeffington Thompson to the living in dispute, after the death of
 the last incumbent, upon the terms of the said Skeffington Thompson
 paying the costs of recovering the same in this suit; and that
 the said Skeffington Thompson had paid a portion of said costs, but
 that in consequence of the litigation being protracted, he (said
 plaintiff) had himself undertaken the expense of same in its later
 stages.

And Counsel for the plaintiff, to maintain the issues aforesaid,
 then read in evidence the said three deeds of the 12th of June and
 9th of August 1793, and the 1st of April 1801; which said deeds,
 by consent of the parties plaintiff and defendants are respectively
 incorporated in this record, in like manner, as if the same were
 set out therein *in hæc verba*.

And Counsel for the plaintiff, further to maintain the issues
 aforesaid, produced as a witness one William Francis Littledale,
 who, being duly sworn, deposed that he is an attorney and solicitor
 of the Irish Courts of Law and Equity, and is the family solicitor
 of Richard William Whaley, Esquire, the plaintiff in this cause;
 and the said witness further deposed that, in the present month
 of March, he went to Paris for the purpose of searching for

documents connected with this case; that he obtained from Earl Cowley, the British Ambassador at Paris, a letter of introduction to the Compté de Laborde, the Director-General of the Imperial Archives and Principal Keeper of the Archives and State Papers of the Government of France; that he accordingly waited on the Compté de Laborde, at the Palais des Archives in the street called Rue de Paradis du Temple, the building in which the French archives and state papers are kept, and in which place the papers connected with Englishmen detained as prisoners, by Napoleon Buonaparte, on the breaking out of the war with England in 1803, are kept; that he brought with him certified copies of papers purporting to be deposited in said place, relating to the said William Whaley; and he, in the presence of one Alexander Toulet, archivist in said office or building, compared said certified copies with the originals thereof, and same are true copies thereof; that witness applied to the said Compté de Laborde, in whose custody those papers are, to allow him to bring with him the said original papers to Ireland for the purposes of this trial; the said Compté de Laborde told him that he had no power to permit him to take away the originals, that such was never done, and that by the laws of France they could not be brought out of that country to foreign places. Among these papers witness found a British passport, bearing date the 22nd of April 1803, and signed by Lord Hawkesbury, Principal Secretary of State for Foreign Affairs to King George the Third. This passport has thereon the English royal arms, and contains a statement that it had been visé'd by General Andreossi, who was at that time the Ambassador of the then French Republic to England. Witness then produced a document purporting to be a copy of said passport, attested to be a true copy of the original passport remaining in the French archives. The copy so attested was produced at a former trial of this cause by the said Alexander Toulet, an officer of the said office, whose signature is attached. Witness further deposed that he himself compared the copy with the original passport in the archives of the French Government, and that it was a true and accurate copy of same passport, with all the indorsements and

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H. T. 1866. visés thereon, and that said copy was signed by the Compté de
Common Pleas. Laborde. Witness further deposed that he is himself acquainted
 WHALEY with the French language, and is capable of translating such
 v. passport; and the witness then produced the said passport written
 CARLISLE. in the French language in the words and figures following:—

“Passport du 22 Avril 1803.

“Nous, Robert Banks Jenkinson, Lord Hawkesbury, Conseiller
 “de sa Majesté Britannique en son Conseil Privé, et son principal
 “Secrétaire d’Etat, ayant le département des Affaires Etran-
 “geres, &c., &c., &c.,”

“Prions et requérons, au nom de sa Majesté, tous amiraux, géné-
 “raux, gouverneurs, commandants, magistrats et autres officiers,
 “tant civils que militaires, quels qu’ils puissent être, des princes et
 “états, amis et alliés de sa Majesté, non seulement de laisser passer
 “M. Whaley et Madame son épouse, sujets de sa dite Majesté, avec
 “leur domestique, ses hardes et baggages, allant en France, sans
 “leur donner, ni permettre qu’il leur soit donné, empêchement quel-
 “conque, mais aussi de leur prêter toute l’aide et tout le secours
 “dont ils pourront avoir besoin dans leur route, ce que nous pro-
 “mettons de réciproquer en pareille occasion.—Donné à Whitehall,
 “ce vingt-deux Avril, mil huit cent trois, et y avons fait opposer
 “l’empreinte de nos armes. (Signé) HAWKESBURY.”

“Vu par le soussigné Ambassadeur de le République Françoise
 “près sa Majesté Britannique, à Londres, le neuf Flo-
 “réal, an onze. (Signé) F. ANDREOSSI.”

“Par le Général de Division Ambassadeur—le Premier Secré-
 “taire d’Ambassade. (Signé) PORTALIS FILS.”

And the witness then deposed that such passport, translated into
 the English language, is as follows:—

“Passport of the 22nd of April 1803.

“We, Robert Banks Jenkinson, Lord Hawkesbury, Privy Coun-
 “cillor of his Britannic Majesty, and his principal Secretary of
 “State for Foreign Affairs, &c., &c., &c.,”

“Pray and request, in the name of his Majesty, all admirals,
 “governors, generals, commanders, magistrates, and other officers,

“ as well civil as military, whatever they be, of princes and states, H. T. 1866.
 “ friends and allies of his Majesty, not alone to let pass Mr. Whaley *Common Pleas.*
 “ and his wife, subjects of his Majesty, with their servants, his *WHALEY*
 “ apparel and luggage, going to France, without giving them or *v.*
 “ permitting them to be given any hindrance whatever, but also *CARLISLE.*
 “ to afford them all the aid and help which they may require on
 “ their way, which we promise to reciprocate on a like occasion.”

“ Given at Whitehall this 22nd April 1803, under our hand and
 “ seal. (Signed) HAWKESBURY.”

“ Seen by the undersigned Ambassador from the French Re-
 “ public to his Britannic Majesty at London, the 9th
 “ Floreal, year 11. (Signed) F. ANDREOSSY.”

“ By the General of Division Ambassador—the First Secretary
 to the Embassy. (Signed) PORTALIS FILS.”

And Counsel for the plaintiff then proposed to offer and give in evidence the document so proved to be a copy of the original passport, and so translated by the witness into the English language; whereupon Counsel for the defendants interposed, and insisted that the said passport and visés were not respectively, nor was either of them, admissible in evidence on the issue as aforesaid, and called upon the Lord Chief Justice so to inform the jury; but the said Lord Chief Justice declined so to rule, or so to direct the jury; but, on the contrary, held that the said passport and visés or indorsements as aforesaid were admissible in evidence, and so informed the jury. And the said Counsel for the plaintiff thereupon gave the said passport and visés in evidence, and read the same to the jury; whereupon the said Counsel for the defendants excepted to the said ruling and direction of the said Judge, and prayed that their exception might be placed on the record.

And the said witness further deposed that he had searched in the proper offices of the Court of Common Pleas for the pleadings in a certain action of *quare impedit*, in which one Bernard Ward was plaintiff, and the Earl of Massareene and others were defendants, and that he could not find the same; and the said witness produced and gave in evidence duly compared and attested copies of the fol-

H. T. 1866. *Common Pleas.* lowing entries in the books of the said Court of Common Pleas, and which copies were in the words and figures following:—

<p>WHALEY v. CARLISLE.</p>	<p>"68.—Ward, Rev. Bernard, v. Bishop of Down and others."</p>	}	<p>"Common Pleas, Hilary Term, 1803. "1st of February, in Quare Impedit, "Furlong, plea No. 223, plea 237; replication, Court of Com- "mon Pleas, No. 20; Hilary, 1804; No. 561."</p>
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"Common Pleas, 27th January, 1802.—The Rev. Bernard
"Ward *versus* The Rev. Lord Bishop of Down and Connor;
"appearance by Richard Keown."

"Common Pleas, Hilary Term, 1802, 23rd of January.—
"The Rev. Bernard Ward *versus* The Right Honorable Clot-
"worthy Earl of Massareene, and the Rev. Bernard O'Doran;
"appearance by Richard Waring."

And the Counsel for the plaintiff, further to maintain the issues
aforesaid, produced two books, which were then by the said
defendants' Counsel admitted to have been the books kept in the
office of William Furlong and Joseph Franklin Chambers, partners
as attorneys and solicitors. And it was further admitted that the
said William Furlong and Joseph Franklin Chambers were long
since dead, as also all the clerks by whom the entries had been
made in such books; and that the entries in such books were
all in the handwriting of deceased clerks of the said firm; and
that the said William Furlong and Joseph Franklin Chambers
had acted as attorneys for William Whaley in the *quare impedit*
cause, and in other matters, in 1803; and that such books were
now produced from the proper custody in which the books of
the said partners ought now to be found; and Counsel for the
plaintiff then proposed and offered to read entries from the said
books—that is to say, a debtor and creditor account, entered in
one of the said books, at folio 39 of said book, in the words
and figures following, that is to say.*

And Counsel for the plaintiff, along with said debtor and creditor
account, proposed and offered to read in evidence an account
in the other of said books, being the book marked B 2, referred
to in the said debtor and creditor account opposite said sum of

* See opposite page.

Dr.		Cr.	
1801.	£ s. d.		£ s. d.
Trinity—Wm. Whaley, Esq., brought from folio 36	163 9 6	Contra.—Brought from folio 36	60 0 0
To further costs respecting sale of house in Denzille-street. M 242 ...	6 11 3	By balance due to William Whaley, Esq., on the foot of account furnished as between the late Mr. Chambers and Mr. Whaley, respecting sale of Mr. Whaley's house and furniture in Denzille-street	144 4 8
" Costs respecting advowson of Killead. B 2—226	46 14 9	1819.	
" Do. relative to judgment against Lord Mathew	below	Aug.—By balance due to W. Furlong	42 16 7½
1801. " Costs in <i>Bourke v. Chamberlain</i> of charge, &c. X 136	13 17 9½		
Aug. 7th—Costs of satisfaction of judgment obtained by Robert Cornwall, in trust for Mr. Whaley, against Lord Massareene, and correspondence and postage on the subject. B 2—230	3 10 0		
May 19th—Like of judgment by William Whaley, Esq., against Lord Mathew, in the Exchequer, Trinity 1790, for £910. B 2—230	3 10 0		
Costs Lord Massareene against Whaley. B 2—229	19 8 0		
	<u>£247 1 3½</u>		
1819.			
August—To the opposite balance due to Mr. Furlong	£42 16 7½		£247 1 3½

H. T. 1866. £46. 14s. 9d. therein contained, and which said account, in said
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 CARLISLE. book marked B 2, is comprised in the pages thereof, from page 218
 to page 226, and shows the items of said sum of £46. 14s. 9d.
 mentioned in said debtor and creditor account, and the tot of
 £46. 14s. 9d. being brought out in said book marked B 2, at
 page 226 thereof, the page referred to in said debtor and creditor
 account; and which account of items is in the words and figures
 following.—[Here follows a very long account, giving in detail
 the particulars of the items of the above entry, "Costs respecting
 the advowson of Killead, £46. 14s. 9d.," and explaining the events
 that then occurred, and the reasons of them.]

Whereupon the said Counsel for the defendants interposed, and
 insisted that the said several last-mentioned entries respectively
 were not admissible in law as evidence against the said defendants
 in this cause, on the ground that it did not appear by such
 entries that the said William Furlong charged himself with any
 sum of money, but that, on the contrary, the balance on the
 whole of said accounts was struck in favour of said William
 Furlong, and requested the said Lord Chief Justice so to inform
 and direct the jury; but the said Lord Chief Justice held and
 affirmed that each of the said last-mentioned entries was admissible
 in evidence for the plaintiff, and declined so to inform the jury;
 whereupon the said Counsel for the plaintiff gave the said last-
 mentioned entries respectively in evidence, and read the same
 to the jury; and thereupon the Counsel for the defendants ex-
 cepted to the said ruling and direction of the said Lord Chief
 Justice as a separate exception to each of the said last-mentioned
 entries severally and respectively, and prayed that such their ex-
 ceptions should be placed on the record.

And the said plaintiff also gave in evidence a certain indenture
 dated the 28th day of March 1810, by which Henry Earl of Mas-
 sareene purported to grant the then next presentation of said living
 of Killead to Arthur Chichester Macartney, therein mentioned, in
 consideration of a sum of £1800. And plaintiff also gave in evi-
 dence the indorsement of the registry of said deed in the Office
 for Registering Deeds in Ireland, dated the 7th day of January

1812, and which deed and indorsement are, by consent, deemed to be incorporated in these exceptions.

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And the said plaintiff then give in evidence that the net annual value of the said living of Killead was the sum of £480 per annum, and closed their case.

And the said defendants thereupon, to maintain the issue in fact above joined between the said parties upon the eighth plea pleaded by the said defendants, gave in evidence a certain indenture of grant, bearing date the 16th day of May 1855, and mentioned in the eighth plea by the said defendants above pleaded, and made between the said defendant John Viscount Massareene, of the one part, and the defendant John Carlisle, of the other part, and whereby the said John Viscount Massareene, in consideration of the sum of £1400, granted to the said John Carlisle the next presentation of the aforesaid rectory of Killead, and which indenture of grant, by the like consent, and in like manner as aforesaid, is incorporated in this record; and the Counsel for the defendants, as proof of the registration of said last-mentioned deed, gave in evidence an office copy of a memorial of the said last-mentioned indenture, which memorial was registered on the 23rd day of June 1855, in the Office for the Registration of Deeds in Dublin; and which memorial, by the like consent of the parties plaintiff and defendants, and in like manner as aforesaid, is incorporated in this record and bill of exceptions; and also a certain other memorial of the said last-mentioned deed, which was registered in the Office for the Registration of Deeds in Dublin on the 9th day of January 1860, before the pleading of the plea by the said defendants, but after the issuing of the writ and filing of the declaration in this cause; and the said defendants, further to maintain their said pleas, and the issues joined therein, gave in evidence the documents following, viz.—a document purporting to be a copy, attested by John Reilly, Esq., the Deputy-keeper of the Rolls in Ireland, of a certain bill filed in the Court of Chancery in Ireland upon the 1st day of December 1797, wherein the aforesaid Clotworthy Earl of Massareene was plaintiff, and the said William Whaley and the said Bernard Ward and others were defendants (and which said copy

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of said bill the Counsel for the said defendants then read, for the purpose of showing that the matters alleged in said bill had there been so alleged, and not as evidence of the truth of the facts thereby alleged), and which said bill contained, amongst others, the following passage:—"And your orator also showeth "that the aforesaid rectory or living of Killead for some years "hath been and is held by John C. Skeffington, clerk, who is "the present rector and incumbent thereof; and, some time in or "about the said month of June 1793, the said William Whaley "requested your orator to give and grant unto him the next turn or "right of presentation of or to the said rectory, which your orator, "who was then unacquainted with the frauds which had been practised upon him, and in return for the said William Whaley's "apparent attention, your orator agreed to do. And the said "William Whaley got some deeds or instruments made ready "for execution, which he represented to be proper for your orator's "granting to him the said William Whaley the next right of "presentation to the said rectory, and to enable him to raise "money for your orator in Ireland; and your orator, considering "such representations to be true, he was prevailed upon by the "said William Whaley to execute such deeds or instruments without reading the same, or any part thereof, and without having "the same read over to him. But your orator hath since discovered that same contained, or purported to be, an absolute "conveyance by deed, bearing date the 12th day of June, of the "advowson and perpetual right of presentation to the said rectory "or living to the said William Whaley and his heirs; and your "orator also showeth unto your Lordship that, when your orator "executed such indenture or deeds as last aforesaid, he was utterly ignorant of the contents and tenor thereof, and that same "were all prepared by the procurement and instructions of the "said William Whaley, and were taken down by him to Bellercay, where your orator executed the same, without receiving or "being paid consideration for the same, or any of them; and that "no attorney or other person perused such deeds, or any of them, "or any draft or drafts thereof, or of any of them, on your orator's

"behalf, previous to the same being executed; and the obtaining
 "such deeds from your orator was grossly fraudulent." And which
 said bill, among other relief, prayed—"That the said defendant
 "William Whaley, and his said confederates, may deliver up, or
 "procure to be delivered up to your orator all the several deeds,
 "instruments, letters of attorney and warrants of attorney herein-
 "before specified, to be cancelled." And by other portion of the
 prayer of said bill, an injunction was prayed against the said defend-
 ant William Whaley, as by said portion of said bill, which, by
 consent of the said parties, is, for the purpose of which it was
 offered and read in evidence, hereby agreed to be deemed to be
 incorporated in this bill of exceptions, as if the same had been
 set out herein at length.

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And the said defendants further gave in evidence an entry of an
 appearance of the said William Whaley, the defendant in the said
 equity suit, wherein the said Earl of Massareene was plaintiff, and
 the said William Whaley and Bernard Ward defendants, of the
 11th day of December 1797, and an entry of a certain other appear-
 ance of the said defendant William Whaley, in said suit of the 31st
 day of January 1805; and having proved a search in the proper
 offices of the Court of Chancery in Ireland for the originals of the
 orders in the cause next hereinafter mentioned, and that such orders
 could not be found, the said defendants gave in evidence certain
 minutes of orders in this suit, as follows, viz.—

"Westley, E. Massareene, <i>v.</i> Whaley."	"Wednesday, 31st January 1798. Mr. Blackburne for P. Petitioner's affidavit R. Ct.—Injunction on appearance."
"King, Massareene, <i>a.</i> Whaley."	"Monday, 7th March 1803. Lord Chancellor. Mr. Orr, for Pt., moves to serve Spn.—to elect Clerk and Solicitor. Ct.—No rule. Affidavit read."
"King, Lord Massareene, <i>a.</i> Whaley."	"Lord Chancellor. Friday, 27th January 1804. Mr. Torrens for Plaintiff. Court— Serjeant-at-Arms."

And the said defendants, to further maintain the said issues on

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their part, gave in evidence a certain document, purporting to be a copy, attested by R. W. Buchanan, Clerk of the Records of the Court of Chancery in Ireland, of a petition which purported to have been filed in the said Court of Chancery on the 18th day of December 1804, in the said suit, and whereby it was prayed by the said petitioner, the said Clotworthy Earl of Massareene, that the said cause might be set down to be heard upon sequestration and return against the said William Whaley, for want of his answer to the said bill; and also (having proved a search as before mentioned) a certain document, attested in like manner, purporting to be the notes of a minute for a conditional decree upon sequestration against the said William Whaley, made in the said last-mentioned suit by the said Court of Chancery, bearing date the 1st day of February 1805, and each of which said two last-mentioned documents, that is to say, the said petition and the said minute, by the like consent of the parties, is, in like manner, incorporated in these exceptions.

And the Counsel for the defendant further proved, by the evidence of Mr. Higginson, the Registrar of the diocese of Down, Connor and Dromore, that Bernard O'Doran had been instituted and inducted to the advowson of Killead, on the 8th day of July in the year 1801, upon the presentation of the said Clotworthy Skelfington Earl of Massareene; and that, on the 25th day of November in the year 1815, the Rev. William Macartney had been instituted and inducted to the said living, on the presentation of Chichester Earl of Massareene; and they also gave in evidence a further rule of the Court of Common Pleas in the said action of *quare impedit*, as follows:—

"20th June, 1804. Ward v. Earl of Massareene and others."	}	"Defendant at liberty to bring down record at the next Assizes at Carrick- fergus, by proviso."
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And the said Counsel for the said plaintiff thereupon went into a rebutting case, and tendered in evidence certain further entries in the aforesaid books of the said late Messrs. Furlong & Chambers—that is to say, the aforesaid debtor and creditor account already given in evidence by him, continued in folio 39 of said first-

mentioned book, and whereby credit was claimed against the said William Whaley for the said sum of £19. 8s. 0d.; and said Counsel offered and proposed, along with such debtor and creditor account, to read in evidence the entries in said book 2, showing the items of which said sum of £19. 8s. 0d. was composed, and which items of £19. 8s. 0d. are set forth in the pages of said book 2, from page 227 to 229, the tot being brought out at page 229, the page referred to in said debtor and creditor account; and which entries of items are in the words and figures following.—[Here follows a long account, containing the particulars of the said entry of £19. 8s. 0d., and extending over the years 1803 and 1804, charging for appearance for William Whaley in the Chancery suit, and in 1805, alluding to the detention of Mr. Whaley in France as a prisoner by Napoleon Buonaparte.]

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And thereupon the Counsel for the defendants interposed and objected that the said several entries respectively were not admissible in law for the said plaintiff, on the grounds that it did not appear by the account connected with said entries that the said William Furlong thereby charged himself with any sum of money, but, on the contrary, that the balance on the whole of said account was in favour of the said William Furlong, and called upon the said LORD CHIEF JUSTICE so to inform the jury; but the said LORD CHIEF JUSTICE ruled that the said several entries respectively were admissible in evidence for the plaintiff, and declined so to inform the jury; whereupon the Counsel for the plaintiff gave the said entries in evidence, and read the same to the jury; whereupon Counsel for the defendants excepted to the said ruling and direction of the said LORD CHIEF JUSTICE, as a separate exception to each of the said entries, on the same ground as in the exception taken to the previous entries out of the said books and direction of the LORD CHIEF JUSTICE, and prayed that their exception might be placed upon the record.

And the Counsel for the plaintiff further tendered in evidence a duly attested and compared copy of an affidavit made in said Chancery cause of *Massareene v. Whaley*, by Richard Waring, the solicitor for said Lord Massareene in said suit; which affidavit

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purported to have been sworn upon the 31st day of January 1805, and to have been filed upon the 1st day of February 1805 in the said Court of Chancery in Ireland, in the said suit of *Massareene v. Whaley*, and also an order of the said Court of Chancery made in said cause, and bearing date the 26th day of February 1805, and whereby the Honorable Chichester Skeffington was ordered to lodge in Court £315. 14s. 5d. and £177. 5s. 9d., unless cause in ten days after service of said order; and which affidavit and order are, by like consent of the parties, incorporated in these exceptions: and thereupon the said defendants' Counsel interposed, and insisted that said affidavit was not admissible in law for the plaintiff, and requested said LORD CHIEF JUSTICE so to inform the jury; but said LORD CHIEF JUSTICE held and affirmed that said affidavit and order were admissible in evidence for the plaintiff, and declined so to inform the jury as required by the defendants' Counsel; whereupon the Counsel for the plaintiff gave said affidavit and order in evidence, and read same to the jury; and thereupon Counsel for the defendants excepted to said ruling and direction of the LORD CHIEF JUSTICE, and prayed that such their exception should be placed on the record.

And the said Counsel for the plaintiff further gave in evidence a duly attested and compared copy of a certain order of reference to arbitration, bearing date the 28th day of April 1798, and made in a certain cause in the Court of Queen's Bench in England, wherein the said William Whaley was plaintiff, and the Right Honorable Sir Clotworthy Skeffington, commonly called Earl of Massareene, was defendant, and duly attested and compared copies of certain other orders made in said cause in said Court of Queen's Bench in England, for extending the time for making the said award, and bearing date 6th of November 1798, 23rd January 1799, 27th April 1799, 7th November 1799, 24th January 1800, 30th April 1800, 13th June 1800, and 7th November 1800, and which said several orders are, in like manner, by the consent of the parties aforesaid, incorporated in the said record.

And, the said evidence being closed on both sides, the said LORD CHIEF JUSTICE charged the jury; and, among other things, he

directed the said jury, upon the issue in fact so joined upon the eighth plea above pleaded by the defendants, to find a verdict that the memorial of the said deed of the 16th day of May 1855 was not duly registered in the Office for Registering Deeds in Ireland, as in the said eighth plea alleged; whereupon the said Counsel for the defendants, before the jury found any verdict, excepted to the said direction of the said LORD CHIEF JUSTICE, and called upon him to inform and direct the jury that the said memorial of the said last-mentioned deed filed in the said Office for Registering Deeds on the 23rd day of June 1855, constituted a valid registration of said deed; but said LORD CHIEF JUSTICE refused and declined so to direct the jury; and, on the contrary, directed them that said memorial was invalid and void at law; to which said direction of the Justice's the Counsel for defendants excepted, and prayed that their exception might be placed upon the record.

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And said Counsel for the defendants further excepted to the said last-mentioned direction of the said LORD CHIEF JUSTICE, and called upon him to inform and direct the jury that the memorial of the said last-mentioned deed, and registered in the Office for Registering Deeds in Ireland, on the 9th day of January 1860, constituted a valid registration of the said last-mentioned memorial; and that, having regard to the said last-mentioned memorial, they should find a verdict upon the said last-mentioned issue for the defendants; but the said LORD CHIEF JUSTICE refused so to direct the jury, and, on the contrary, informed the jury that, inasmuch as the said last-mentioned memorial was admittedly registered after the commencement of the present action, though before the pleading of the said plea by the defendants as aforesaid, the same ought not to be regarded by them upon the said issue; and notwithstanding said last-mentioned memorial, and upon the ground aforesaid, the said LORD CHIEF JUSTICE directed the jury to find upon the said issue in manner as aforesaid; and therefore, and before the said jury found any verdict, the said Counsel for the defendants excepted to the said last-mentioned directions of the LORD CHIEF JUSTICE.

And the said LORD CHIEF JUSTICE, in charging the said jury, having informed them that the said passport, and the said visés

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and indorsements thereon, were good and sufficient evidence to be received by them on the part of the plaintiff, the said Counsel for the defendants (before the finding of any verdict as aforesaid) objected to the same being so left to the consideration of the jury, and requested the said LORD CHIEF JUSTICE to withdraw the said last-mentioned documents and their contents from the consideration of the jury, which the said LORD CHIEF JUSTICE refused to do; and thereupon the said Counsel for the defendants, before any verdict as aforesaid, excepted to the said direction and decision of the said LORD CHIEF JUSTICE, and prayed that their exception might be placed on the record.

And the said LORD CHIEF JUSTICE having informed the jury that the said affidavit of the said Richard Waring, and the said order in said cause of the 26th day of February 1805, was good and sufficient evidence for the plaintiff, the said Counsel for the defendants objected to the same being so left to the consideration of the jury, and requested the LORD CHIEF JUSTICE to withdraw the said last-mentioned documents and their contents from the consideration of the jury, which the said LORD CHIEF JUSTICE refused to do; and thereupon the said Counsel for the defendants, before any verdict as aforesaid, excepted to the said direction and decision of the said LORD CHIEF JUSTICE, and prayed that their exception might be placed on the record.

And the said LORD CHIEF JUSTICE having informed the jury that the said entries in the said book of the said Furlong & Chambers, to the reception of which in evidence as aforesaid the Counsel for the defendants had objected and excepted as aforesaid, were good and sufficient evidence to be received by them on the part of the plaintiff, the Counsel for the defendants objected to the same, severally and respectively, being so left to the consideration of the jury, and requested the said LORD CHIEF JUSTICE to withdraw the same, severally and respectively, from the consideration of the jury, and which the said LORD CHIEF JUSTICE refused to do, as to each of the said entries; whereupon, and before any verdict as aforesaid, the Counsel for the defendants excepted to the said direction and decision of the LORD CHIEF JUSTICE, as a separate exception to

each of the said entries, and prayed that such their exceptions should be placed upon the record; and the said LORD CHIEF JUSTICE thereupon affixed his name and signature to the said bill of exceptions.

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End of Defendants' Exceptions.

W. D. Andrews (with him *May*), for the defendants.

The exception respecting the passport is of a two-fold character—namely, the admissibility of the passport itself, and the admissibility of the visé upon it, and is in point of fact so taken on the record. The Judges are not bound to take judicial notice of who were the persons who held any offices of State at any particular period, and therefore there is no evidence as to Lord Hawkesbury's having been Secretary of State for Foreign Affairs on the 22nd of April 1803. But even if it were allowable for the Judges to take judicial knowledge of the name of the person who filled a particular office of State at a particular time, that cannot be the case as to those who held public offices under Foreign Governments. There is no doubt but that the Court can know judicially who at the present time fills any office of State under our own Government, but it cannot take judicial notice of who was the predecessor of any present officer. The only ground on which it can be contended that the entries in the books of Messrs. Furlong & Chambers are evidence is, that they are said to be against the pecuniary interest of the persons who made them; and the simple principle on which such entries are admissible at all is, that no man would be likely to make an untrue entry if its effect were to injure himself. When, however, there is a charging and a discharging side to the account, we cannot look at the latter side, as the person making the entry thereby attempts to discharge himself of the sum in which by the other side of the account he admits that he is indebted: *Doe* d. *Kinglake* v. *Beviss* (a). But, even if one account were admissible, it cannot be said that another to which reference is made in the former is so incorporated with it that every entry in the latter is thus made evidence. We, however, contend that none of the entries were admissible: *Knight*

(a) 7 C. B. 456.

H. T. 1866. *v. Marquis of Waterford* (a). An affidavit made in a former case
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Falkiner, for plaintiff (*Butt*, and *Harrison*, with him).

If the objection to the reception of the passport, on the ground that there is no means of knowing that Lord Hawkesbury was Secretary for Foreign Affairs in 1803, is a good one, the defendants in this case must be prepared to affirm that the Courts are shut out from regarding historical facts. As to the next objection—that in reference to the entries in the account-book,—it is not now open to the defendants to argue the exception upon any ground different from that taken at the trial: *Regina v. O'Connell* (c); *Bain v. Whitehaven and Furness Junction Railway Co.* (d). Even if, however, it could be argued on the ground suggested by the other side, it is impossible that the objection can be allowed to succeed: 1 *Taylor on Evidence*, p. 585, s. 608. A clear distinction exists between the case of a person claiming credits against a balance due by him, and that of a person giving credit as against a balance in his own favour: *Rowe v. Brenton* (e); *Higham v. Ridgway* (f). The present accounts are much more than a mere offer of set-off. Here there is a plain and necessary connection between the different sides of the account; the one side is not fully intelligible without the other. The true test as to whether or not an entry is against interest is, whether the entry “furnished evidence which “would be conclusive against the person making the entry, sup-“posing him to bring an action for work and labour”?—[See *Warren v. Greenville* (g), cited in *Higham v. Ridgway*]. It would, moreover, be a serious misfortune if the Court should feel itself coerced into rejecting such evidence as that afforded by well kept books of account—*Doe v. Michael* (h),—especially when we every

(a) 4 Y. & C. 283.

• (b) 8 Ir. Law Rep. 128.

(c) 7 Ir. Law Rep. 261 (per Crampton, J. 309)

(d) 3 H. of L. Cas. 1.

(e) 3 M. & R. 268.

(f) 2 Smith's L. Cas. 249.

(g) 2 Strange, 1129.

(h) 17 Q. B. 276.

day see mere family gossip admitted to prove questions of pedigree. Respecting the admissibility of the affidavit, it is not too much to ask the Court to say that they cannot come to the conclusion that the Master of the Rolls did not order a person to bring money into Court, without an affidavit being sworn and filed that he had the money in his possession.

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Butt.

No objection was made at the trial to the evidence given by Mr. Littledale, as to the fact that if an English subject had gone to France prior to 1803, having a passport, that passport would be found in a certain office in France; and as he was not cross-examined as to his means of knowledge, there was evidence on that point to go to the jury. The Court, moreover, are entitled to take judicial knowledge as to who were the chief officers of State at any time: *Res v. Jones (a)*; 1 *Taylor on Evidence*, 4th ed., p. 27. But even if this were not so, it follows from the settled principles of evidence that, where a person purports to fill a certain office of State, and acts in that capacity, it is to be presumed that he really holds the office the duties of which he is purporting to discharge; and this argument may also be extended to persons acting as Consuls. In the present case the document is upwards of thirty years old, which fact gives strength to this latter view of the case. If it were necessary to prove that England was at war with France in 1803, we might refer to several Acts of Parliament in which the hostilities then existing are incidentally mentioned; but this being an historic fact which affects the entire people, it is not necessary to prove it, such being judicially recognised: 1 *Taylor on Evidence*, 4th ed., p. 24, and 2 *Taylor on Evidence*, p. 1495, s. 1585. As to the date of the passport, it is a fundamental rule of law that every document must be presumed to have been issued at the time it bears date. As to the account-books, it is admitted on the record that they were books kept by the Messrs. Furlong and Chambers; and that the clerks who made the entries are all since dead. The books are properly admissible in evidence, on

(a) 2 Camp. 131.

H. T. 1866. the principle that if a person does business for another, and charges
Common Pleas. him for it, and on the other side of the account gives credit for
 WHALEY money received by him, by which means the balance due to him is
 v. reduced, these latter entries, being clearly against the pecuniary
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 of the account, and make the entire of it evidence: *Warren v. Greenville (a)*; *Higham v. Ridgway (b)*. And what difference in principle can there be between the case of a man saying he has been paid in full, or saying that he has been only paid a portion of his demand? I can understand no ground on which such a difference could be contended for; and if the payment had been in full in this case, the cases of *Warren v. Greenville* and *Higham v. Ridgway*, which have been already cited, would be direct authorities. Even if the items of the account were upon two distinct pieces of paper, both would be admissible: *Musgrave v. Emmerson (c)*. In other words, we rely in this case on the fact that the sum of £247 due to Furlong & Chambers is, by credits which are beyond doubt entries against interest, reduced to £42; which fact entitles the Court to look at every item which is thus partially paid. Moreover, exceptions must, according to the general rule, be construed strictly; and as the present exception rests the objection upon the ground that the balance of the account is struck in favour of the person making the entry, it is admitted on the record that if the entire amount said to have been due had been paid off, the entries would have been admissible. 1 *Taylor on Evidence*, p. 585, s. 608, shows clearly that no objection can be taken because the balance is in favour of the person who makes the entry. The present case does not fall within the class of cases relied on upon the other side, for *Doe v. Bevis* and *Knight v. The Marquis of Waterford* were cases where money had been received, and the persons receiving it, having acknowledged that fact by certain entries, tried to discharge themselves by taking credit for payments made by them. In *Higham v. Ridgway*, however, as

(a) 2 Strange, 1129.

(b) 2 Smith's L. Cas. 249.

(c) 16 Law Jour., Q. B. 174.

in the present case, the debt was due to a workman, on what is in point of fact a workman's account.

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May, in reply.

The passport is simply a letter from a person calling himself the Secretary for Foreign Affairs, directed to third parties, and is only evidence that it was issued at the time at which it bears date, but is no evidence as to the period at which Mr. Whaley was in France; and the visé upon it by General Andreossi, being only a memorandum by him, cannot surely be given in evidence. Moreover, there is a correct way to prove all such things: 2 *Taylor on Evidence*, p. 1495, s. 1585. The real question, however, in the case is as to the admissibility of the entries in the books of Messrs. Furlong & Chambers; and what the plaintiff now wants to do is to put in evidence the bills of costs of his father's attorneys, alleged to have been due to them for work done in proceedings between him and Lord Massareene in reference to the subject-matter of the present suit—a most unheard of proceeding. *Prima facie*, an entry made by a person who is not examined as a witness, and who is not subjected to the test of cross-examination, cannot be read; the exception to that rule being that, if the person who has made the entry is dead, and if the entry is against either his personal or his proprietary interest, then it is receivable in evidence. It is perfectly possible that the work charged for in these bills of costs may never have been done; and, at any rate, all the entries, with the exception of two, are in favour of the person whose accounts they were. This case is to be distinguished from the case of *Higham v. Ridgway*, because the entry in that case was an admission that certain work had been paid for; whereas in this case we have only a statement by the attorneys that they would keep money which had come into their hands as a set-off against the sum they said Mr. Whaley owed them. If it were necessary, I think I might argue that if the entry of the money received were “on account of costs to be found in book 2, folio 36,” that would not be sufficient to entitle the jury to refer to that folio. The rule as to the reception of entries which are against

H. T. 1866. interest, being an exception to the general rules of evidence, must
Common Pleas. not be extended, but must be construed strictly. As to the form
 WHALEY of our objection, it is substantially this—not only do you not
 v. charge yourself at all, but you even discharge yourself so far as
 CARLISLE. to show a balance due to you. We object only to the discharging
 side, and to every item of it. “The Court must put a fair con-
 struction upon the exceptions on the record,”—*per* Jebb, J., in
Rhodes v. Hunter (a).

Cur. adv. vult.

Jan. 31. · MONAHAN, C. J.

This case comes before us on a bill of exceptions. The case is neither new to us, nor is it creditable to the administration of the law, for this is the third or fourth or fifth time that verdicts in it have been set aside; and the same rule, I regret to say, applies to this case, as we cannot allow the verdict to stand. But the question is, upon what grounds we come to that conclusion. The matter objected to was the reception of certain evidence. There was no objection taken to my charge. The plea was *non concessit*; and the question was, whether a certain deed made by Lord Massareene, on the 12th of June 1793, was really his deed; and though the execution of the deed by him was admitted, there was supposed to be sufficient evidence to justify the jury to consider whether or not he had been imposed upon. I need not go into that, because of the former judgment. It appeared that, notwithstanding this deed transferring the advowson to Mr. Whaley, the father of the plaintiff, Lord Massareene had, on two former occasions, presented to the living. It also appeared that a bill had been filed by Lord Massareene to set aside the deed of the 12th of June 1793, upon the ground that he had intended to execute the deed for one purpose, whereas he was induced to sign an instrument operating in a very different manner. It also appeared that an action of *quare impedit* had been brought but subsequently abandoned. The question really was, whether there was sufficient evidence to justify the jury in coming to the conclusion that the deed was not the deed of Lord Massareene. In order to show that

(a) 2 H. & B. 589-90.

there was no foundation for this defence, it became necessary for the plaintiff to show why he had allowed Lord Massareene to present on two occasions to the living as if no such deed had existed. And then, upon the other side, it was urged that, even though the *quare impedit* had been abandoned, Lord Massareene had not proceeded to set aside the deed; and it was incumbent on the defendant to show why Lord Massareene did not go on with the suit to have the deed set aside. One of the suggestions made by the plaintiff, to account for the non-prosecution of his rights by his father, was that at the time his father was a prisoner in France. It appeared that he had been detained a prisoner of war in France as one of the *detenus* by Napoleon Buonaparte during the war which commenced in 1803 between the United Kingdom and France. But the plaintiff thought it necessary to go further, and he tendered in evidence a passport, purporting to be signed by Lord Hawkesbury, as Minister of Foreign Affairs to King George the Third, in 1803; and it appeared that it purported to be visé'd by M. Andreossi, Ambassador of the French Republic at London, and it was found in the archives in Paris, where such documents, if taken from any of the *detenus*, ought properly to have been deposited; the document was objected to by defendant's Counsel. I overruled the objection, and received the passport in evidence. We are all of opinion that the document was properly received in evidence, the Court taking judicial notice of the great Officers of State. It was contended that this was not true to an unlimited extent; that we must stop somewhere, and that the Court cannot take judicial notice of an event which happened so long ago. We have, however, come to the conclusion that the Court ought to know that Lord Hawkesbury was Foreign Minister in 1802; and, therefore, that the evidence was properly received at the trial.

Then comes another exception, which we feel should be allowed. The question was, the admissibility of a certain account entered in the books of the late Mr. Furlong. That account was given in evidence for the purpose of furnishing particulars of certain *quare impedit* proceedings. The unfortunate state that

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the records of this Court were in was such that the pleadings could not be found, and therefore it was as a sort of secondary evidence of the various steps which had been taken in the *quare impedit* suit that the document was tendered in evidence. It appeared to consist of entries in the books of Messrs. Furlong & Chambers, in a debtor and creditor account.—[His Lordship here read the debtor side of the account, and referred particularly to the item £46. 14s. 9d. for "Costs respecting the advowson of Killead," and another set of costs called "Costs, *Lord Massareene v. Whaley*, B. 2, 229—£19. 18s.," for setting aside the deed.]—The credit side of the account is in this form:—"Brought over from folio 36, £60." Therefore this is a credit admitted by Mr. Furlong, of £60. The next item purports to be a balance of £144. 4s. 8d. due to Mr. Whaley on foot of certain sales for him, of which Mr. Furlong received the proceeds. Therefore there is a clear admission that Mr. Furlong had received on account of Mr. Whaley £144. 4s. 8d., and the account is prepared on the supposition that they are setting off the one side against the other. On looking at the sum of £42. 16s. 7½d., it appears to be the sum that was required to make the debits equal to the credits, and it appears that the account leaves that sum due to Mr. Furlong. Counsel for the plaintiff proposed to give in evidence, along with the debtor and creditor account, another account showing the particulars of the item of £46. 14s. 9d. mentioned in this debtor and creditor account; and, that being so, an exception is placed on the record, in these words: "Whereupon the Counsel for the defendant interposed, and insisted "that the said several last-mentioned entries respectively were not "admissible in law as evidence against the said defendants in this "cause, on the ground that it did not appear by such entries "that the said William Furlong charged himself with any sum of "money; but that, on the contrary, the balance on the whole of "said accounts was struck in favour of the said William Furlong," and the LORD CHIEF JUSTICE overruled the objection. I think it right to mention, that though this exception is on the record, and is the one we are bound to act upon, it differs from the one taken at the trial. The entry in my note-book was this:—"Plaintiff tenders

"in evidence the late Mr. Furlong's cash-book, in which he debits
 "Mr. Whaley with costs respecting the advowson of Killead, and
 "admits, &c., leaving a balance payable to Mr. Furlong. De-
 "fendant's Counsel objects on the ground that Mr. Furlong claimed
 "a balance; and I ruled that this being a debtor and creditor
 "account, of which a sum of costs was admitted to have been paid,
 "the fact that the balance of the account was in the favour of the
 "attorney did not make the account inadmissible in point of law."
 The objection that has been put on the record is, that the account
 is inadmissible, not because it shows a balance claimed, but because
 the account does not show that the costs were in fact paid, but
 that the substance of the account is, that there was a set-off against
 costs, and that it is not an account of costs and payments, but
 of costs on the one side and of credits not immediately connected
 with the costs on the other.

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The case has been argued at very considerable length, and the
 authorities have been referred to. The objection that I thought
 that I was deciding at the trial has not been argued; indeed it
 could not have been, because the case of *Higham v. Ridgway*
 proves that the fact of a payment being entered in an account
 entitles you to look at all the items which have been so paid;
 so that if this were an item paid, you might look further to as-
 certain of what it was made up; and the fact of a balance having
 been struck in favour of Mr. Furlong would not render the document
 inadmissible. But, inasmuch as this account consists of items of
 this description that they are in the nature of a debtor and creditor
 account, the consequence is that you may enter the items of the
 credit side and give them in evidence. So that you may give
 in evidence the entry of the sum of £144. 4s. 8d., yet you are
 not at liberty to give in evidence the items not immediately
 connected with it. The case of *Doe v. Bevis*(a) is in point.
 That was an action brought by a lord of a manor, who claimed
 to be entitled to the possession of certain lands in the occupation
 of the defendant. The defendant was a customary tenant of the
 manor, and the question was, whether the land was his, or

(a) 7 C. B. 456.

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whether he had a right to the pasturage of it only. The language of the entries on the Court roll, being the "pasture of the land and underwood of Haydwood," one question was, whether that was sufficient to pass the land itself; but evidence was given that the defendant, and those under whom he claimed, had, for a great length of time, enjoyed the soil as well as the pasture. The lord, however, attempted to prove that the soil was his, by showing that in early times the timber did not belong to the then tenants of the land in dispute, although by the custom of that manor timber was the property of the customary tenants of the lands. For this purpose he gave in evidence certain ancient pipe-rolls containing the account of the reeves of six of the hundreds into which the manor was divided. The substance of the pipe-rolls is this—on the one side of the account is set down the sums with which the party furnishing the accounts—namely, the steward or receiver, is debited—and the various items of the debits are entered. Among others were the items of sums which he had received from the persons who had occupied the wood; and no doubt was felt but that all the items with which he had debited himself were properly received. But they wanted also to give in evidence the items on the opposite side of the account, which were certain disbursements for the benefit of the woods. There was no balance struck; and the question was, whether they were not also to admit in evidence the entries of the payments which he had made. The Court of Common Pleas in England ruled that, notwithstanding the principle established by *Higham v. Ridgway*, an account which cannot be considered in the nature of payments, but is merely a matter of set-off, ought not to be received against third parties. We do not feel ourselves at liberty to review that decision here; and the only question, therefore, which we have really to consider is this—within which of those cases does the present case properly fall? If, in the case before us, there was not a balance struck in favour of Mr. Furlong, it would be undistinguishable from *Doe v. Bevis*, because it would be, as it were, two separate accounts of debts and credits, and could by no means amount to a case of payment. The only question then is this, whether the circumstance of Mr. Furlong

having entered in this account this item, "By balance due to William Furlong £42. 16s. 7½d.," alters the character of the account, and renders it admissible in evidence? We have come to the conclusion that that is not so; we have come to the conclusion that the mere striking of the balance is the mere mechanical operation of subtracting the debtor from the creditor side of the account, which anybody could do; and therefore we do not think that this alters the character of the account, so as to distinguish this case from *Doe v. Bevis*. Another question was this, whether, having regard to the form of the exception, it is not open to the objection in *Bain v. Whitehaven and Furness Railway Company*? Of course we are only at liberty to look at the records; and there the form of the exception is this:—"He objects that these later entries, namely, the "component parts of the item of £46. 14s. 9d., are not admissible "in law, on the ground that it did not appear that the said William "Furlong charged himself with any sum of money." It is true that he does not charge himself with any sum of money, but the contrary.

During a portion of the argument, I thought I could bring this case within the case in the House of Lords (*Bain v. Whitehaven and Furness Railway Company*); but we have come to the conclusion, upon consideration, that we cannot do so. In that case, an objection was taken, on the ground that the call-letters were not in writing. Evidence was given that, according to the Law of England, upon the construction of the English Companies Clauses Consolidation Act, which was almost exactly in the same terms as the Scotch Act, such letters did not require to be signed in writing. The objection was, that the evidence of the English Barrister ought to have been rejected, on the ground of surprise; and no objection was taken to the reception generally of the evidence of English Law, on the ground that it had nothing to do with the case. The parties were held to be tied down by the form of the exception; and the House allowed the evidence, which they could not have done if the evidence had been objected to at the trial. But this case does not come within that one; for here, though they gave a bad reason for their objection, yet they took a proper objection. The other objection was, to the attested copy of the affidavit of Lord Massa-

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Common Pleas. *ley*, and the order of the 25th of February 1805, which, it is alleged,
WHALEY were not admissible. We think, however, that there were sufficient
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CARLISLE. grounds to justify us in receiving that evidence.

With respect to the objections as to the registration, the case has been already decided. We, therefore, overrule all the objections, except that relating to the admissibility of the entries in Mr. Furlong's books—this exception we allow, and direct a *venire de novo* to issue.

CHRISTIAN, J., said that he deferred to the opinion of the other Members of the Court, but would have more willingly concurred in a contrary judgment.

O'HAGAN, J.

I concur in the judgment of the Court, and do not think it necessary to add anything to the reasons on which it has been grounded. I do not entertain a doubt as to the question on the admissibility of evidence; but, with reference to the point upon the form of the exception, I have entertained serious doubts, which are not yet removed. I am, however, unable to distinguish this case from the cases of *Doe v. Beviss* and *Knight v. Marquis of Waterford*; and I think that a *venire de novo* must therefore issue.

Venire de novo granted.

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An acceptance in the words "For Richardson & Son, Thomas Popple" is not equivalent, according to the Law Merchant, to the form "Per proc. Richardson and Son, Thomas Popple." The former expression does not, like the latter, import a special and limited authority to do a specific act; nor does it put the drawer of a bill, accepted in that form, upon discovery, whether the agent has exceeded his authority.

Acceptance in the form "For Richardson and Son, Thomas Popple," is to be governed by the general rule of law applicable to principal and agent. Therefore the course of dealing by the agent acting for his principal with third parties, is evidence to go to a jury towards determining the extent of the agent's authority.

It is not necessary to serve notice of motion for liberty to appeal. *E. O'Reilly v. Richardson and another*

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ARREST.

M. having obtained a writ of *habeas corpus*, directed to the Marshal of the Marshalsea, and to the Sheriff of D., the Marshal returned that M. had been handed over to him, under a writ of *ca. sa.*, by the Sheriff of D., and had been in his custody since; that while in such custody a Judge of the Bankruptcy and Insolvency Court had required the production of M. as a witness in that Court; that he was brought up on two occasions, in the Marshal's custody, without the knowledge or consent of the Sheriff, and was again brought back to the Marshalsea. On the second occasion M. refused to return with the Marshal, but was compelled to do so.

Held, that those facts did not constitute an escape, and that, accord-

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ingly, he was still in the lawful custody of the Marshal. Q. B. *In re Moylan* 674

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BAIL.

Where the depositions make out a *prima facie* case of felony against the prisoners, and show a state of things which indicates that the prisoners enjoy a large amount of sympathy and support from the public, the Court will not be influenced, on an application to admit to bail, by the fact that the prisoners are able and ready to procure bail.

(HAYES, J., *dissentiente*). Q. B. *The Queen v. M'Cormick* 411

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BIGAMY.

Indictment for bigamy.

A. was married to M. S., according to the rites of the Established Church, in 1858, and in April 1865, during the lifetime of M. S., he was married to C. B., in a Roman Catholic church, in Dublin. C. B. knew A. six months previous to the marriage, and believed him to be a Roman Catholic. He told C. B. that he was a Roman Catholic. He had been born and reared a Protestant, and had attended the Protestant service on Christmas morning 1865.

The jury found that A. was a professing Protestant within twelve months previous to the marriage, and

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that he had held himself out as a Roman Catholic to the clergyman who married him, and had told the woman he was a Roman Catholic; and they convicted him of bigamy.

Held—(MONAHAN, C. J., FIGOT, C. B., KEOGH, and O'HAGAN, JJ., *dissentientibus*), that the conviction was bad. Cr. Cas. Resvd. *The Queen v. Fanning* 289

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BOROUGH.

The special Act for the borough of B. enacts that the limits of the Act shall be the borough of B. for the time being; and the Act is to be put in force within those limits subject to the subsequent provisions of the Act. Section 276 enacts that:—"It shall be lawful for the Council from time to time to direct and declare what districts within the limits of this Act shall be lighted and watched under the authority of this Act; and in like manner from time to time to declare and direct whether any and what districts shall be added to the parts already lighted and watched; and the districts so appointed to be lighted and watched as aforesaid, and the districts from time to time added thereto, shall be considered as the districts to be lighted and watched by the Council under the authority of this Act, until the same shall be altered by the Council; and the owners and occupiers of any messuages, houses, shops, buildings or premises, not within the district so

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from time to time set out and lighted and watched, shall not be subject or liable to payment of any of the rates by this Act directed to be raised." The Act contained sections giving appeal to P. S. A was owner of certain premises within the limits of the borough, in a district "directed to be lighted and watched," but not actually lighted and watched. Having been assessed for certain rates, A did not appeal, and now sought to raise the question of his liability by action of replevin.

Held (FITZGERALD, J., *dissentiente*) that A's position ousted the jurisdiction of the Town Council; and so that the question could be raised by action.

By a subsequent special Act (16 and 17 Vic., c. 114) it was provided that the owner of a demesne of forty acres, under certain circumstances, should be exempt.

Held, that this section does not oust the jurisdiction of the Town Council, but, being only matter of exemption, should be raised by appeal, and not by action of replevin. Q. B. *Murphy v. Lyons* 9

BYE-LAW.

A bye-law of a Railway Company, duly sanctioned by the Board of Trade, declared that "each passenger not producing or delivering up his ticket, will be required to pay the fare from the place whence the train originally started; or, in default of payment thereof, shall forfeit a sum not exceeding forty shillings."

Held (PIGOT, C. B., *dissentiente*), that, although this specific act was not mentioned in the 109th section of the 8 & 9 Vic., c. 20, it came within the scope of the authority given by the 108th section of that Act to Railway Companies to make bye-laws "for regulating the travelling upon the railway;" and that the arrest of a passenger who refused to show or give up his ticket at a station, and

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whose name and residence were unknown, was warranted by the 154th section of the above statute.

An act which may result in an obstruction to the officers of a Railway Company is not a "wilful obstruction," within the meaning of the 3 & 4 Vic., c. 97, s. 16; to bring it within that section, the act must have been committed with a direct intention and tendency to obstruct.

Per PIGOT, C. B.—The power of arrest, for the purpose of bringing the offender before a Magistrate, is limited to violations of the 8 & 9 Vic., c. 20, the bye-laws contained therein, and of the special Act of the Company.

When passengers, travelling upon branch lines to the termini of the main line, have to await the arrival of a train upon the main line to reach their destination, the terminus of the main line from which the train started is "*the place from which the train originally started.*"

A passenger took a ticket from a station on the Cavan branch of the Midland Great Western Railway to Dublin, and was conveyed from the Mullingar Junction to Dublin, by a train which had been specially dispatched from Ballinasloe, in consequence of the train from Galway having broken down; upon his refusal to give up his ticket at Dublin—

Held, that his fare from Ballinasloe was rightly demanded, notwithstanding that the tickets on the Cavan line had been inspected at the station next before Mullingar. E. *Barry v. The Midland Great Western Railway Co.* 103

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A having sued B in the Civil-bill Court, for an alleged debt of £34, a settlement was come to, whereby it was agreed that B should pay to A £20 in cash, and should secure the balance by the joint and several promissory note of himself and C, and should also pay 10s. costs. B, in consequence of this arrangement, did not appear at the hearing of the civil-bill, and A got a decree, which he put into execution. B having sued A for breach of the express contract—

Held, upon demurrer to the special count, that the action properly lay. C. P. *Burke v. O'Callaghan* 42

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Action for assault and battery, and obstruction of right of way, against W. and J.;—W. allowed judgment to go by default. J. paid five pounds into Court on the second count, and traversed the first; and issue was taken on the traverse; the jury found a verdict for £1. The Taxing-officer allowed plaintiff's full costs. The Judge gave no certificate.

Held, that the plaintiff was not entitled to costs. E. *Walsh v. Walsh* 195

COSTS, BILL OF.*See* SOLICITORS ACT.**COSTS OF APPEAL.**

A consent to submit a case to the Court of Queen's Bench provided that if, "by the decision of the Court, &c., then the defendant is not legally entitled, and judgment is to be entered for the said relator with costs;" and, if the Court were of a contrary opinion, "judgment is to be entered for the said defendant, with costs; and either party might bring error upon the judgment of the Court upon this special case." The Queen's Bench decided for the defendant; the Exchequer Chamber for the relator. No judgment was made up.

Held, that the relator should have costs in the Court of Queen's Bench,

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both parties to abide their own costs in the Exchequer Chamber. Ex. Ch. *The Queen v. Crosthwaite* 488

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A constable went to the house of A, to obtain information about B, and was then told by A certain facts implicating A in a treasonable conspiracy. The constable left, and returned next morning and asked A if he was willing to come down and repeat his statement to the superintendent of police. The superintendent asked A to go before a Magistrate and make an information "as a witness." A consented, made an information, and afterwards re-swore it; and made a further information in the presence of B and others. He was examined by the Magistrate and by Counsel, and received no caution against criminalizing himself. Subsequently he refused to give evidence on the trial of B, and the other prisoners; he was arrested and tried for treason-felony. His own informations were put in evidence against him, and he was convicted.

Held (dissentientibus MONAHAN, C. J., and KEOGH, J., dubitante FITZGERALD, B., as to the first information) that both informations were inadmissible, and that accordingly the conviction was erroneous.—Cr. Ap. The Queen v. Gillis 512

DAMAGES.

The measure of damages in an action upon an apprenticeship deed, for wrongful dismissal, is the loss *actually* sustained by the specific breach of covenant complained of up to the time of action brought; and the jury, in such an action, cannot, therefore, take into consideration the possible

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injury the plaintiff may have sustained by reason of his wrongful dismissal, as such damages are not damages in the ordinary course of things flowing from the breach.

Where there has been a misdirection at the trial, the Court above has no discretion to refuse to set aside the verdict. C. P. *Parker v. Cathcart* 778

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DUBLIN GAZETTE.

Certain Acts of Parliament made copies of *The Dublin Gazette*, "purporting to be printed and published by the Queen's authority," conclusive evidence in certain cases under those Acts. On the trial of the prisoner, a copy of the *The Dublin Gazette* was given in evidence. It purported to be printed and published at *The Dublin Gazette* office, No. 87 A. street, by A. T., of, &c. It also contained, under the title, the words "Published by authority."

Held, that the document in question was not evidence, within the Acts of Parliament, and the conviction was accordingly erroneous. Cr. Cas. Resvd. *The Queen v. Wallace* 206

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Evidence.—A witness may refresh his memory by reference to entries in a book; which entries were made by another person under witness's directions, from documents written by witness at the time of the transactions, and which entries were regularly compared by witness with the original memoranda. Q. B. *Lord Talbot v. Cusack* 213

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GUARANTEE.

FISHERY APPEAL.

A, owner in fee of the shore adjoining the river S., let to B, by yearly tenancy, a fixed net, erected in 1815, and continued down to present time in the same site.

Held, reversing the decision of the Commissioners of Fisheries, that the letting to, and user by B, did not render the net illegal under the 5 & 6 Vic., c. 106, s. 19. Q. B. *Vandeleur v. Malcolmson* 569

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1. A guarantee was entered into in the following terms:—"B. M. & Son, Gentlemen,—Considering that you have employed W. F. as your agent, I hereby agree, and bind and oblige, as cautioner for the whole intromissions, actings and doings of the said W. F., as your agent; it being understood however that the above cautionary obligation is not to exceed the sum of £100 sterling.—I am, gentle-

GUARANTEE.

men, your obedient servant, F. H. W."

In an action by R. M. and Son against F. H. W., for goods supplied to W. F., as their agent, since the date of the guarantee—

Held, that the action lay.

Held also, that the terms were of themselves sufficiently intelligible.

The parties to whom the guarantee was given were named as R. M. and Son. In the plaint the plaintiffs were described as W. Y., C. H., and J. P., trading as R. M. & Son.

Held, that the names of the plaintiffs sufficiently appeared on the face of the guarantee. *Q. B. Gorrie v. Woodley* 221

2. Action against sureties of one A. R., under a bond which recited that said A. R. had been taken into service and employment of the B. Banking Co., as a writing clerk; said bond to be void if said A. R., during his continuance in the service and employment of the Co., duly discharged the said service, and "all and every other service of said Co. wherein he is, shall, or may be employed;" and should, whenever required, account for all moneys, notes, bills, bonds, &c., which, in the said service or employment, should come into his hands, and make good the balance of such account; and should, at the expiration or other determination of said service or employment, hand over all moneys, &c., and keep the said Co. indemnified against all loss; said A. R. to remain in the employment of the said Co. for three years; subject to discharge for misconduct. After said three years, said sureties to have power to withdraw, by giving three months' notice in writing; said A. R. to have like power to terminate his engagement.

The plaint set out several breaches by A. R.

Defence—That, after three years elapsed, A. R. ceased to be a writing

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clerk, and was, without the consent of the defendants, appointed cashier of a branch bank of said Banking Co., and in that capacity committed the alleged breaches.—Demurrer thereto.

Held—reversing the decision of the Queen's Bench, and allowing the demurrer—(MONAHAN, C. J., and PIGOT, C. B., *dissentientibus*),—that the recital did not control the words of the condition, and that the defendants' liability continued while A. R. was employed in the service of the Co., and no notice of withdrawal was given. *Exch. Cham. Thompson v. Roberts* 490

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HUSBAND AND WIFE.

1. To a count in an action by a husband and wife upon a promissory note passed to the wife *dum sola*, the defendant pleaded that the note was passed in fraud of *his* (defendant's) marriage, and therefore void. The plaintiffs replied, upon equitable grounds, that the plaintiff, the husband, had married before the note became due, upon the faith that it would be duly paid, and without notice of the fraud. To two other counts upon accounts stated and settled before and since plaintiff's intermarriage respectively, the defendant pleaded that the accounts therein mentioned were stated concerning the promissory note in the first count mentioned, and not otherwise.

Held, on cross demurrers to the replication, and to the second and third defences, that—

1—Where a document is referred to in a plea, the Court will look at it, and treat it as incorporated in the plea.

2—The fact that a plea purports to be pleaded on equitable grounds does

not prevent the Court from treating it as a legal plea, in case it be found to amount to one.

3—The note was void *ab initio*, upon grounds of public policy, and was not set up by the mere fact of the marriage of the payee before its maturity.

4—The rule as to indorsement for value without notice is confined to cases where the security is in fact indorsed for value.

5—The second and third defences are bad, because the mere reference in them to the promissory note in the writ of summons and plaint mentioned does not incorporate the allegations contained in the first defence.

Semble—If the first defence had been unsustainable at *Law*, the equities being equal, the legal right to recover upon the note would have turned the scale in favour of the plaintiffs.

Semble—An equitable replication, which goes to show that the right to sue is only an equitable one, is bad.

Semble—In a Court of Equity the plaintiffs would fail, because the equities being in other respects equal, the defendant's equity would be preferred, as prior in point of time.—*Rice v. Rice* (2 Drew. 77–8).

Quære—Can fraud upon a marriage contract be pleaded at law to an action upon a bond?

Roberts v. Roberts (3 P. Wms. 65) discussed. C. P. *Lee v. Hayes* 394

2. Action for goods sold and delivered.

Traverse.—At the trial it appeared that goods had been supplied to defendant's wife, and payments made by her on account; that a bill had been accepted by defendant's wife, and made payable at plaintiff's house, in order to conceal it from defendant; that the goods were supplied for the consumption of defendant's family, and consumed by them at his house,

ILLICIT WHISKEY.

and with his knowledge; that he had never known of the dealings with plaintiff, or authorised dealing on account; that he had made his wife a weekly allowance for necessaries, and had always paid for all necessaries in cash. The Judge told the jury that a mere private arrangement would not be sufficient to rebut the presumption of the wife's agency. Verdict for the plaintiff.

On motion for a new trial, on the ground of verdict being against evidence, and misdirection—

Held (O'BRIEN, J., *dissentiente*)—That the direction was right.

On the question of evidence the Court was equally divided; LEFROY, C. J., and FITZGERALD, J., holding that there was no sufficient evidence to rebut the presumption. O'BRIEN and HAYES, JJ., entertaining a contrary opinion. Q. B. *Moylan v. Nolan* 427

ILLICIT WHISKEY.

The 17th section of the 1 & 2 W. 4, c. 55, does not justify an excise officer in forcibly entering and searching a house where illicit whiskey is suspected to be concealed, but has reference only to cases where whiskey in the process of manufacture, or the materials or appliances of the process are supposed to be concealed.

The search-warrant issued under the authority of this section should be directed to the officer who has made the information.

A constable who, without malice, aids or assists in such forcible entry is entitled to a month's notice of action.

Since the passing of the Common Law Procedure Act 1853, actions against the Excise are transitory, though the statute localising the venue is not expressly referred to in it.

Quære—Should the plea of justification set out the grounds of suspicion

INFRINGEMENT, &c.

which lead to the making of the information upon which the warrant had been issued? C. P. *Tute v. Mathew* 641

INFRINGEMENT OF PATENT.

See PRACTICE, 6.

INTEREST, ENTRIES AGAINST.

See QUARE IMPEDIT,

INTERROGATORIES.

See PRACTICE, 6.

INTERRUPTION TO NAVIGATION.

See SHANNON NAVIGATION.

JUDGMENT.

See WARRANT OF ATTORNEY.

JUDICIAL NOTICE.

See QUARE IMPEDIT.

JURISDICTION.

*See BOROUGH.
TRESPASS.*

JUSTICE OF THE PEACE, ACTION AGAINST.

*See PLEADING, 1.
WARRANT OF COMMITTAL.*

JUSTIFICATION.

See TRESPASS.

LEASE.

A lease contained a proviso that it should be lawful for the lessee to surrender the premises to the lessor, "first giving unto the lessor, &c., &c., six months' previous notice in writing of such intention to surrender, paying off all rent and arrears of rent that shall or may be due, including the day of such surrender taking effect, and per-

LIBEL.

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forming all covenants," &c., &c. Notice of surrender for the 25th of March 1863 was served by the lessee upon the lessor; but the rent then due was not paid for some months afterwards.

Held, that no surrender took place under the proviso in the lease; that no new tenancy was created; and that, under the facts in the case, a surrender could have taken place, or a new tenancy have been created, only by deed. E. *McGrath v. Shannon*

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LIBEL.

See REPORTS OF PUBLIC OFFICERS.

R. wrote a notice to L., Mayor of B., and certain members of the Town-council, saying that, in a certain event, he would use said letter to charge them with the felony of manslaughter; "and take further notice that, as regards those whom, with the Mayor, I intend to have returned for trial at the next Assizes, for the conspiracy alleged to have been carried out on the 13th of December last, I will, if they again conspire illegally to exclude the said burgesses, &c., use this notice to charge the said persons accused as conspirators, with the felony of murder." R., being convicted on a criminal information moved in arrest of judgment.

Held, that this letter disclosed a good ground for a criminal information.

Held further (by LEFROY, C. J., and HAYES, J.), that slanderous words spoken of and to a Mayor, in the discharge of his office as Mayor, and of him in the execution of his office, the said Mayor being also a Magistrate in virtue of his office, are the subject of a criminal information.

Held (by O'BRIEN and FITZGERALD, JJ.), that such words are not the subject of an indictment, nor, consequently, of a criminal information. Q. B. *The Queen v. Rea* 584

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LIMITATIONS, STATUTE OF.

See *ILLICIT WHISKEY.*

LORD LIEUTENANT, ACTION AGAINST.

No action is maintainable against a Lord Lieutenant of Ireland in an Irish Court, during his continuance in office, for any act done by him *qua* Lord Lieutenant; and where such an action has been brought, the Court will, on motion, direct that the writ of summons and plaint be taken off the file, without putting the Lord Lieutenant to his plea.

The question whether the act complained of was or was not done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury. C. P. *Luby v. Wodehouse* 618

MANDAMUS.

See *RAILWAY COMPANY, 2.*

MARRIAGE BY A ROMAN CATHOLIC PRIEST.

See *BIGAMY.*

MARSHAL.

See *ARREST.*
PLEADING, 3.

MAYOR.

See *LIBEL.*

MERCANTILE LAW AMENDMENT ACT.

Mercantile Law Amendment Act.—Chattel real.—F issued a writ of *fi. fa.* against the defendant, and lodged it with the Sheriff on the 3rd of August. Warrant to seize under writ delivered to bailiff, but no seizure proved. On the 6th of August defendant assigned his interest in a term of years to W. and Co., who had no notice of the writ. On the 12th of August the Sheriff sold the term to plaintiffs, and executed a deed of assignment on the 4th of September.

PLEADING.

Held, that plaintiffs were not entitled to recover in ejectment. Q. B. *O'Brien v. Murray* 46

MISDIRECTION.

See *DAMAGES.*

MUTINY ACT.

See *PLEADING, 3.*

NAME OF FIRM.

See *GUARANTEE, 1.*

NEW TENANCY.

See *LEASE,*

NOTICE.

See *SUMMARY JURISDICTION ACT.*

NOTICE, JUDICIAL.

See *QUARE IMPEDIT.*

NOTICE OF ACTION.

See *ILLICIT WHISKEY.*

NOTICE TO APPOINT ARBITRATOR UNDER 19 & 20 Vic., c. 113, s. 16.

See *PRACTICE, 4.*

PARTY EMBLEM.

See *PLEADING, 2.*

PATENT, INFRINGEMENT OF.

See *PRACTICE, 6.*

PAYMENT INTO COURT.

See *PRACTICE, 2.*

PLEADING.

See *GUARANTEE, 2.*
ILLICIT WHISKEY.

1. Where, in an action against a Justice of the Peace, for assault and false imprisonment, the defendant complained that he did the act complained of in the execution of his duty as such

PLAINT.

Justice of the Peace, and with respect to matters within his jurisdiction as such Justice—

Held, that the defence was embarrassing, for not setting forth facts to show the grounds of the alleged jurisdiction. C. P. *Donahoe v. Keogh* 39

2. Action for assault. The defendant pleaded that he was a Sub-inspector of Constabulary; that plaintiff went through the street wearing a party emblem, the wearing whereof was calculated and tended to provoke animosity; that a crowd followed, threatening her, and on the refusal of the plaintiff to remove the said emblem, the defendant, "as such Sub-inspector, in order to preserve the public peace, which was likely to be broken in consequence of the said conduct of the plaintiff, and to protect the plaintiff from the said threatened violence, and which violence the said several persons who were provoked by the conduct of the plaintiff, in consequence of the said conduct, were likely to inflict on the plaintiff, and in order to restore order and tranquillity in said town, then gently and quietly, and necessarily and unavoidably removed said emblem from the plaintiff," &c. Demurrer thereto.

Held (*dubitante* FITZGERALD, J.), overruling demurrer, that the defence was good. Q. B. *Humphries v. Connor* 1

3. Plea to an action for false imprisonment, that the action is brought against defendant solely for acts done by him as Governor or Provost-Marshal of the military prison of A, duly constituted, &c., under the Acts for the time being in force for punishing mutiny, &c., and in relation to the custody and imprisonment of the plaintiff as a military offender, with and by the defendant as such Governor and Provost-Marshal; and he further says that he is not guilty.

Held, that the plea should be amended by striking out the induce-

POSTPONEMENT, &c. 831

ment, and saying "That defendant pleads not guilty under and by virtue of the Mutiny Act and the several Acts incorporated therewith." E. *Murphy v. Fielding* 375

4. Plea to the ordinary count for goods sold and delivered, "That no money was owing from the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant as alleged," is bad. E. *Kennedy v. Kelly* 391
5. To a summons and plaint in ejectment for non-payment of rent, against A, alleging that A "holds, &c., as tenant to the plaintiff," it is a good defence, that "A does not hold the premises in plaint mentioned as tenant to the plaintiffs, as alleged." E. *Keene v. M'Blaine* 654
6. It is not necessary, in an action against the drawer of a bill, for non-acceptance, to aver the delivery of the bill to the plaintiff. In an action for the non-acceptance of a foreign bill, where the bills have been drawn in sets of three, it is not necessary to aver either the non-acceptance or non-payment of the second and third bills.

It is no ground of demurrer to an action under the Summary Procedure on Bills of Exchange (Ireland) Act 1861, that the plaint does not aver that the cause of action arose within six months before action brought. C. P. *Devereux v. Morrissey* 785

PLEADING SEVERAL COUNTS, COSTS OF.

See PRACTICE, 2.

POPULAR SYMPATHY WITH ACCUSED.

See BAIL.

POSSIBLE INJURY.

See DAMAGES.

POSTPONEMENT OF TRIAL.

The Court will, under special circum-

stances, postpone a trial from one After-sittings to another, where it appears, from the affidavit of defendant's attorney, that there is a reasonable prospect of defendant's being enabled by the delay to procure material witnesses; though the affidavit does not specify the witnesses, nor the particular facts they are expected to prove. *E. Murphy v. Fielding*

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PRACTICE.

See ACTION AGAINST A LORD
LIEUTENANT.

POSTPONEMENT OF TRIAL.

1. Plaintiff served a plaint on the 23rd of October, and filed it on the 9th of November, but gave no notice of filing to defendant. On the 9th, defendant served notice to amend plaint. On the 11th, plaintiff served cross-notice consenting to amend; and on the 13th, Court made an order, on consent, staying proceedings until certain amendments made and certain costs paid. No amendments made, and no costs paid. On the 12th of May 1866, plaintiff issued another writ for the same causes of action.

Held, these facts sustained a plea of another action pending. *E. Doran v. Chancellor*

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2. Plaint contained two counts in contract for non-delivery of goods; also counts for trover and for detinue. Defendant traversed contracts alleged in the two first counts, and paid £14. 2s. 6d. into Court on the other two. Issues were taken on the two first counts, and as to the sufficiency of money paid into Court. Verdict for plaintiff upon one of the counts in contract, with £14. 5s. damages, but for defendant on the other counts. The Taxing-master allowed only half plaintiff's costs.

Held (by LEFROY, C. J., and FITZGERALD, J.), affirming the Master's decision, that the plaintiff had recovered less than £20 in an action of contract.

Held (by O'BRIEN and HAYES, JJ.) that all the counts should be considered as one action, and therefore that defendant was entitled to full costs. *Q. B. Devine v. The London and North Western Railway Company*

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3. In error in fact by defendants, the memorandum of error directed by the 179th section of the Common Law Procedure Act 1853 to be lodged with the Master of the Court, need not be signed by all the defendants in the cause: it is sufficient if it be signed by those of the defendants who allege error, or their attorney. Where there are several defendants, the 179th section still necessitates the proceeding by summons and severance in error in fact, after the lodgment of the memorandum of error. Therefore, an assignment of error by two out of fourteen defendants, without having given to all the defendants by summons and severance the option of joining or not, is null and void. An assignment of error by two defendants, when only one signed the memorandum of error, is void. Error in fact lies for the appearance of an infant by attorney.

Semble—Whether the 175th section, which purports to abolish summons and severance in error in law, applies to error in fact or not, the record must, in some way, by suggestion or otherwise, show that the other defendants declined to join in the assignment of error, or had an opportunity of electing to do so. *E. Greene v. Leclerc*

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4. After the service of the notice given by the 19 & 20 Vic., c. 113, s. 16, requiring the opposite party to appoint a new arbitrator as a condition precedent to the appointment of a sole arbitrator, seven clear days must elapse, upon any of which the opposite party might appoint an arbitrator; and, therefore, the time that intervened between the expiration of a reference and the subsequent enlarge-

PRACTICE.

ment of the time for making the award by order of a Judge, cannot be counted in the seven days.

Quere—Whether the refusal of an arbitrator, after having heard a portion of the case, to act any further in the matter, constitutes such a “disagreement,” within the meaning of the Common Law Procedure Act 1856, as would authorise the interposition of an umpire? C. P. *Healy v. Healy* 649

5. Where a sum of money was paid by the plaintiff for the purchase of a floating cargo, upon an agreement, that in case the cargo should, upon its arrival at the port of discharge, be found to contain any damaged grain, such grain should be upon seller's account, and the value thereof returned:

Held, in an action brought upon this agreement, that such a failure of consideration happening to occur at an Irish port, is a sufficient portion of the cause of action to attract the jurisdiction of the Irish Courts, and enable them to substitute service upon an agent in Ireland.

Adams v. Gerapolo (5 Ir. Jur., N. S., 217) discussed. C. P. *Adams v. Mauro and others* 686

6. Common Law Procedure Act 1856, ss. 56–7. Form and extent of interrogatories which may be exhibited to a defendant in an action for the infringement of letters patent, before plea pleaded. Such motions need not, in this Court, be upon notice. C. P. *Thomas v. Tillie & Henderson* 783

PRELIMINARY NOTICE.

See SECURITY FOR COSTS.

PRIVATE ARRANGEMENT.

See HUSBAND AND WIFE, 2.

PRIVILEGED COMMUNICATION

See REPORTS OF PUBLIC OFFICERS.

QUARE IMPEDIT. 833

PROCEEDING IN CHANCERY.

See QUARE IMPEDIT.

PROCEDURE ACT.

See PRACTICE. 3, 4, 6.

PROCLAMATION,

See DUBLIN GAZETTE.

PROFESSING PROTESTANT.

See BIGAMY.

PROMISSORY NOTE.

See HUSBAND AND WIFE, 1.

PUBLIC ROAD.

See SUMMARY JURISDICTION ACT.

PUBLIC WORKS, COMMISSIONERS OF.

See SHANNON NAVIGATION.

QUARE IMPEDIT.

1. The Court may take judicial notice of the persons who filled the great Offices of State so long ago as 1803.

2. The fact that the balance on foot of a debtor and creditor account is struck in favour of the party having made the entry and since deceased, does not prevent the entries in the account from being admissible in evidence as entries against interest.

3. Entries of a debtor and creditor account, in the books of a deceased attorney, are not to be admitted as evidence, merely because there are items on the other side of the account that are admitted.

4. The facts of the present case bring it within the rule in *Doe d. Kinglake v. Beviss* (7 C. B. 456), and not within the rule in *Higham v. Ridgeway* (1 East. 109).—CHRISTIAN, J., *dubitante*.

5. The Court cannot go behind the bill of exceptions on the record to

ascertain what the objections made at the trial really were.

6. The affidavit of a deceased solicitor, made and filed in the course of a Chancery suit, may be admitted in evidence in conjunction with an order of the Court made upon a motion in the suit shortly afterwards, although it does not appear on the face of the order that the affidavit was used upon the motion. C. P. *Whaley v. Carlisle* 792

RAILWAY COMPANY.

See BYE-LAW.

1. The delivery or risk note of a Railway Company, whose station-masters were empowered to book cattle through from stations in Ireland to market towns in England, contained a notice that "The Company will in no case be responsible for any damage done to live stock arising from over-crowding any waggon, or for the delivery of cattle or live stock at any particular time, or for any particular market."

Held, that such stipulation did not qualify the implied contract to deliver within a reasonable time, but only prevented the question of reasonable time from being affected by the express wish of the consignor to have his cattle delivered at a particular time, or for a particular market.

The sailing bills of a Steam Packet Company, whose vessels formed a link in a through-booking system, contained a condition as follows:—"Cattle to be forwarded by this route are received, subject to this express stipulation, that if it shall be found, on the arrival of the cattle in Dublin, that there is not room for the conveyance of the cattle by the next ordinary vessel of the London and North Western Railway Company proceeding to Holyhead, the Company shall not be bound to forward the cattle until the sailing of the ordinary vessel next following that of the vessel in which there shall not be room for the

cattle." Part of a contract to carry cattle was in writing, viz., the above sailing bill, part by parol.

Held, that it was a question for the jury whether, upon the evidence, the contract between the parties had been made subject to the above stipulation or not. E. *Mathews v. The Dublin and Drogheda Railway Co.* 87

2. M.'s lands were injuriously affected by a Railway Co., and A applied verbally to arbitrator sitting at N. to assess compensation. Arbitrator refused compensation, on the ground that none of M.'s lands were taken. On an application for a *mandamus*, Counsel urged that though the ground of refusal was erroneous, yet that the *mandamus* ought not to go, as there was no written claim for compensation, as directed by statute.

Held (dissentiente O'BRIEN, J.), that the arbitrator was not precluded from raising this objection now.

Held also, that the objection was decisive against M.'s right to a *mandamus*. Q. B. *The Queen v. Fishbourne* 148

REPORTS OF PUBLIC OFFICERS.

Reports made in discharge of the duties of their respective offices, by Government officials, to the Crown, or its representatives, are state documents, and their production in Court cannot be enforced. A report made by an Inspector-General of Prisons, Ireland, under the 59th section of the 7 G. 4, c. 74, to the Lord Lieutenant, is a state document, and privileged, as its production would be injurious to the public interest.

Therefore, in an action of libel, brought by an officer of the Marshalsea of the Four-courts, upon his dismissal, against the Inspector-General, who had held an investigation into the discipline of that prison, and had made a report thereon to the Lord Lieutenant, the inspection and pro-

RETURN OF GOODS.

duction of the report, under the 64th section of the Common Law Procedure Act 1853 and the 55th section of the Common Law Procedure Act 1856, was refused. At the trial of the action the plaintiff was non-suited, and the cause shown against the conditional order for a new trial was allowed. *E. M'Elveney v. Connellan* 55

RETURN OF GOODS.

See TRESPASS.

RIGHT OF WOMEN TO VOTE.

See TOWNS IMPROVEMENT ACT, 2.

ROAD, PUBLIC.

See SUMMARY JURISDICTION ACT.

ROMAN CATHOLIC PRIEST, MARRIAGE BY A.

See BIGAMY.

SEARCH WARRANT.

See ILLICIT WHISKEY.

SECURITY FOR COSTS.

The preliminary notice for security for costs, under the 52nd General Order 1854, must be served at least twenty-four hours before the service of the notice of motion, and no order will be made for security for costs if this has not been done. *E. Jack v. Noble*

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SERVICE, SUBSTITUTION OF.

See PRACTICE, 5.

SETTING ASIDE VERDICT.

See DAMAGES.

SEVEN-DAY NOTICE TO AP- POINT ARBITRATOR.

See PRACTICE, 4.

SHANNON NAVIGATION.

The S. Navigation Act, 2 & 3 Vic., c. 61, s. 58, imposes a penalty on any person who should throw or *deposit* in the river S. any ballast, gravel, or

SOLICITORS ACT.

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other matter or thing, so as to interrupt or obstruct the free passage of water through the same, or the navigation thereof.

Held,—that C., having placed nets attached to movable frames in the S. for catching eels, was not liable to conviction under this section.

The same Act, sec. 38, imposes a penalty on making, &c., any weir, dam, watercourse, or other matter or thing in the river S., or any weir diverting the waters of the S., or introducing into it other waters, &c., *which, in the opinion of the Commissioners of Public Works*, may prove injurious to the navigation thereof, or to the drainage, &c.

Held (HAYES, J., *dissentiente*)—That in order to enable Justices to convict under this section, the Commissioners should first determine the act complained of was productive of such injury. *Q. B. Hornsby v. Con-
sidine* 660

SLANDER.

See LIBEL.

SOLE ARBITRATOR.

See PRACTICE, 4.

SOLICITORS ACT.

A bill of costs, in order to comply with the statute 12 & 13 Vic., c. 53, s. 2, must clearly point out on the face of it, or by some writing connected with it, the party or parties to be charged.

K., an attorney, was jointly retained by R., W., and C., to conduct certain proceedings in Chancery and in the Landed Estates Court, and delivered two bills of costs to R. One, a bill of Chancery costs, was entitled in the margin in the causes and matters, and and endorsed "Miscellaneous costs of R., and directed to R. The other, of Landed Estates Court costs, was entitled in the matters, and headed "Costs of R., W., and C." and en-

dorsed "Costs between solicitor and client," and directed to R. There were some items in the bill of Chancery costs with which R. alone was chargeable.

Held, that the bill of Chancery costs was insufficient to charge W. and C. E. *Kiernan v. Brereton*

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SPECIAL ACT.

See BOROUGH.

STATE, ACTS OF.

See LORD LIEUTENANT, ACTION AGAINST.

STATE, GREAT OFFICERS OF.

See QUARE IMPEDIT.

STATUTE OF LIMITATIONS.

See ILLICIT WHISKEY.

STATUTES QUOTED.

8 & 9 Vic., c. 20, s. 108.

SUB-INSPECTOR OF CONSTABULARY.

See PLEADING, 2.

SUBSTITUTION OF SERVICE.

See PRACTICE, 5.

SUMMARY JURISDICTION ACT.

The summary Jurisdiction Act forbids the erection of any house, or part of a house, within thirty feet of the centre of any public road, with certain exceptions. It also enables the county surveyor, on giving ten days' notice, to summon the offending party before the Petty Sessions.

A had an old wall, erected before the passing of the Act, within thirty feet of the centre of a public road; he subsequently raised it, and made it part of a cow-shed. Some corres-

TOWN COUNCIL.

pondence passed between the county surveyor and A. No formal notice was given; and he was summoned and fined; the summons not negating the exceptions.

Held, that notice was only required where the county surveyor sought to do the necessary work at the cost of the offending party.

Held also, that, though the summons was defective, the Court, in the exercise of its discretion, would not grant a writ of *certiorari*. Q. B. *The Queen v. Justices of Tipperary* 564

SUMMARY PROCEDURE ON BILLS OF EXCHANGE (IRELAND) ACT, 1861.

See PLEADING, 6.

SUMMONS.

See SUMMARY JURISDICTION ACT.

SURETY.

See GUARANTEE, 1.

TAKING PROCEEDINGS OFF THE FILE.

See LORD LIEUTENANT.

TAXATION OF COSTS.

See ASSAULT AND BATTERY. PRACTICE, 2.

TENANCY AT WILL.

See FISHERY APPEAL.

TENANCY, NEW.

See LEASE.

TOWN COMMISSIONER, ELECTION OF.

See TOWNS IMPROVEMENT ACT, 2.

TOWN COUNCIL.

See BOROUGH.

TOWNS IMPROVEMENT ACT.

TOWNS IMPROVEMENT ACT.

1. Towns Improvement (Ir.) Act 1854, section 22, defines the qualifications of voters at the election of Town Commissioners, "Every person of full age who is the immediate lessor;" also "Every person of full age who shall have occupied as tenant or owner, or joint occupier, or shall have been the immediate lessor of any lands," &c.

Held, that women of full age were admissible to vote under this section.

Quere, whether women were eligible as Town Commissioners? Q. B. *The Queen v. Crosthwaite* 157

2. Towns Improvement (Ireland) Act 1854. Section 22 defines the qualifications of voters at the election of Town Commissioners:—"Every person of full age who is the immediate lessor," &c., also "Every person of full age who shall have occupied as tenant or owner, or joint occupier, or shall have been the immediate lessor of any lands," &c.

Held (MONAHAN, C. J., PIGOT, C. B., and BALL, J., *dissentientibus*), reversing the decision of the Queen's Bench, that women, though possessing the qualifications mentioned in these sections, were not eligible to vote at such election. Ex. Ch. S. C. *The Queen v. Crosthwaite* 463

TRESPASS.

A brought an action of trespass and trover against B, who, after service of the writ of summons and plaint, but before filing his defence, returned to the plaintiff the goods, the seizing of which was the substantial cause of action. He afterwards pleaded, justifying the seizure of the goods under a civil-bill decree. The plaintiff then applied to the Court for an order that the defendant should pay him the costs of the suit up to the time of the return of the goods, on the ground that, inasmuch as the parties resided in the same civil-bill jurisdiction, and the value of the goods did not exceed

WARRANT OF ATTORNEY. 837

£5, the plaintiff would be deprived of his costs in the event of the Judge at the trial refusing to certify.

Held, that the motion should be refused.

Held also (CHRISTIAN J., *dubitante*), that, independently of the question of merits, the Court had no jurisdiction to grant such an application. C. P. *Barry v. O'Brien* 36

TROVER.

See TRESPASS.

VENUE.

See ILLICIT WHISKEY.

VERDICT UNDER £20.

See PRACTICE, 2.

VERDICT, SETTING ASIDE.

See DAMAGES.

VICEROY, ACTION AGAINST.

See LORD LIEUTENANT.

VOTER.

See TOWNS IMPROVEMENT ACT, 1.

WARRANT OF ATTORNEY.

The defendant obtained a warrant of attorney to confess judgment against A, but did not file the warrant pursuant to 20 & 21 Vic., c. 60, s. 334. Defendant marked judgment within twenty-one days after the execution of the warrant, duly registered said judgment, and levied the amount of his debt by writ of *fi. fa.* Subsequently A became a bankrupt, and his assignees sued defendant to recover the goods.

Held (*dissentiente* FITZGERALD, B.), affirming the judgment of the majority of the Court of Queen's Bench, that the assignees could not recover. Exch. Ch. *Assignees of Skelly v. Keeffe* 232, 266

WARRANT OF COMMITTAL.

A warrant of committal for trial stated "J. P., of N.," as complainant, and "W. K., J. H., and J. S.," as defendants, recited a complaint against the said defendants, and then proceeded, "This is to command you, &c., to lodge the said ———, of N., in the gaol of N.," &c.

Held, that this warrant was no defence to an action for false imprisonment by J. H. against the Justice who signed the warrant. *E. Hodgins v. Poe* 383

WILL.

A testator, seised of lands in fee and quasi fee, by his will devised "*all his property, lands, tenements and premises*," at and about the two denominations, and his plate, library, pictures, and furniture to A. He directed an annuity to be paid to his wife "*out of the rents, issues, dividends, interest and profits of my said estates*." By a codicil the testator directed that, "*if it should happen that my son A die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs*," then his lands of both denominations, charged with the annuity to his wife, and with any reasonable provision A

should make for his wife, should, *at A's death, descend* to his grandson D, who was to take the testator's name in addition to his own. The codicil also declared that, in case of A's death *without heirs of his body lawfully begotten or to be begotten, in that case, and in default of such heirs*, the testator gave the sum of £6000 to his daughter M. A entered into possession on the testator's death, executed disentailing deeds of both denominations, and died without ever having had issue.

Held, that, under the above devise, A took either an estate for life, or in fee, in both denominations, with an executory devise over to D in fee.

Coltsman v. Coltsman (15 Ir. Com. Law Rep. 171) followed by the Exchequer Chamber. The Judges were equally divided. Ex. Ch. *Coltsman v. Coltsman* 692

WITNESS REFRESHING MEMORY, BY ENTRIES.

See EVIDENCE.

WOMEN, WHETHER ENTITLED TO VOTE.

See TOWNS IMPROVEMENT ACT, l.



